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p. 511. Held, label is not within a statute against false pretences

p. 512. The owner must have relinquished to part with title, & not merely possession

p. 513. Passerby, handing notes when bank known to be closed

p. 514. False statement of purpose to which money will be used is not a false pretence, just a pretence of an existing fact

p. 515(1). Premier sent a Bill notes to person from whom she ordered goods. She did not have by other means. Evidently, she had no intent to pay.
Convicted

p. 515(2). Ordering goods from a tradesman & sending without money & paying.
Not guilty

p. 516. Selling bag in pawn shop - Held, no false pretences. But note, the statement was more specific than true

p. 523. Statement that chain is 15 carats. False pretence

p. 526. A false pretence, which was also true representations, as sufficient foundation for prosecution

p. 526, (a) A pretence the absurd, is criminal or, if offences

X (b) But not, if it is honestly made

p. 528. Goods supplied pursuant to a contract secured by false pretences
Conviction reversed

p. 530. Representations by a name, follows to his performance & identity, by notes of which he got a banknote.
Guilty

p. 531. Count 1. Not guilty, because it was not shown that the check of the person given by D was from his bank to be used.
Count 2. Not guilty, because false representations to name was not material

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CASES
ON
CRIMINAL LAW

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY
WILLIAM E. MIKELL,
PROFESSOR OF LAW IN THE UNIVERSITY OF PENNSYLVANIA

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT
GENERAL EDITOR

ST. PAUL
WEST PUBLISHING COMPANY
1908

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RTF 13 May 53

TO
MY CLASS-MATES
ARCHIBALD GILCHRIST SINGLETARY and FRANK BARRON GRIER
The one learned in the Civil the other in the Common Law
In appreciation of a long and valued friendship

(iii)*

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THE AMERICAN CASEBOOK SERIES.

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.

Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including
the Law of Bailment.
Real Property. $\left\{ \begin{array}{l} \text{1st Year.} \\ \text{2d} \\ \text{3d} \end{array} \right.$ "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Dean of the University of Nebraska School of Law. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

- Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*
- Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*
- Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.*
- Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*
- Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*
- Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*
- Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*
- Joshua R. Clark, Jr., Assistant Professor of Law, George Washington University. *Subject, Mortgages.*
- Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*
- Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*
- Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*
- William C. Dennis, Professor of Law, George Washington University. *Subject, Public Corporations.*
- James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

The following books of the Series are now published, or in press: Partnership, by Eugene A. Gilmore, Professor of Law, University of Wisconsin; Criminal Law, by Wm. E. Mikell, Professor of Law, University of Pennsylvania; Damages, by Barry Gilbert, Professor of Law, University of Illinois; Conflict of Laws, by Ernest G. Lorenzen, Professor of Law, George Washington University; Trusts, by Thaddeus D. Kenneson, Professor of Law, University of New York.

JAMES BROWN SCOTT,
General Editor.

Washington, D. C., November 16, 1908.

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“No department of law can claim greater moral importance than that which, with the detail and precision necessary for legal purposes, stigmatizes certain kinds of conduct as crimes, the commission of which involves, if detected, indelible infamy and the loss, as the case may be, of life, property or personal liberty.” 1 Stephens’ History of Criminal Law, ix.

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(xx)†

Question of law stated p. 2; whether could punish for an act not made Criminal by Statute.

Note distinction between ① Power to punish which act not made criminal by statute and ② Power of Congress to pass a statute concerning this. ① is only question of law.

Theoretical nature of U.S. Gov't. Created in 1789. Covers the same territory as the States. The States have general jurisdiction and U.S. Gov't has not



CASES ON CRIMINAL LAW.

CHAPTER I.

SOURCES OF THE CRIMINAL LAW.

SECTION 1.—CRIMINAL LAW OF THE FEDERAL GOVERNMENT.

UNITED STATES v. WORRALL.

(Circuit Court of United States, Pennsylvania District, 1798. 2 Dall. 384, Fed. Cas. No. 16,766, 1 L. Ed. 426.)

The defendant was charged with an attempt to bribe Tench Coxe, the Commissioner of the Revenue, the indictment containing two counts. Verdict—Guilty on both counts of the indictment.¹

Dallas, who had declined speaking on the facts before the jury, now moved in arrest of judgment.

Rawle, District Attorney, contra.

CHASE, Justice. Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject. The indictment cannot be maintained in this court.

Rawle, answering in the affirmative, CHASE, Justice, stopped Mr. Levy, who was about to reply, in support of the motion in arrest of judgment, and delivered an opinion to the following effect:

CHASE, Justice. This is an indictment for an offense highly injurious to morals, and deserving the severest punishment; but, as it is an indictment at common law, I dismiss, at once, everything that has been said about the Constitution and laws of the United States.

In this country, every man sustains a two-fold political capacity; one in relation to the state, and another in relation to the United States. In relation to the state, he is subject to various municipal regulations, founded upon the state Constitution and policy, which do not affect him in his relation to the United States; for the Constitution of the Union is the source of all the jurisdiction of the national government, so that the departments of the government can never assume any power that is not expressly granted by that instru-

¹ Part of this case is omitted.

ment, nor exercise a power in any other manner than is there prescribed. Besides the particular cases which the eighth section of the first article designates, there is a power granted to Congress to create, define, and punish crimes and offenses, whenever they shall deem it necessary and proper by law to do so for effectuating the objects of the government; and, although bribery is not among the crimes and offenses specifically mentioned, it is certainly included in this general provision. The question, however, does not arise about the power; but about the exercise of the power—whether the courts of the United States can punish a man for any act, before it is declared by a law of the United States to be criminal. Now, it appears to my mind to be as essential that Congress should define the offenses to be tried, and apportion the punishments to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction.

It is attempted, however, to supply the silence of the Constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offense which has been committed; but, in my opinion, the United States, as a federal government, have no common law, and, consequently, no indictment can be maintained in their courts for offenses merely at the common law. If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and yet it is impossible to trace when or how the system was adopted or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers as by the judges and lawyers of England, that they brought hither, as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence he who shall travel through the different states will soon discover that the whole of the common law of England has been nowhere introduced, that some states have rejected what others have adopted, and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another, but the common law of England is the law of each state, so far as each state has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or state court.

But the question recurs, when and how have the courts of the United States acquired a common-law jurisdiction in criminal cases? The United States must possess the common law themselves before

they can communicate it to their judicial agents. Now, the United States did not bring it with them from England, the Constitution does not create it, and no act of Congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England, or modified, as it exists in some of the states; and of the various modifications which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?

Upon the whole, it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common-law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say whether the offense is at this time cognizable in a state court. But certainly Congress might have provided by law for the present case, as they have provided for other cases of a similar nature; and yet if Congress had ever declared and defined the offense, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject.

PETERS, Justice. Whenever a government has been established, I have always supposed that a power to preserve itself was a necessary and an inseparable concomitant. But the existence of the federal government would be precarious, it could no longer be called an independent government, if for the punishment of offenses of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the state tribunals, or the offenders must escape with absolute impunity.

The power to punish misdemeanors is originally and strictly a common-law power, of which, I think, the United States are constitutionally possessed. It might have been exercised by Congress in the form of a legislative act; but it may, also, in my opinion, be enforced in a course of judicial proceeding. Whenever an offense aims at the subversion of any federal institution, or at the corruption of its public officers, it is an offense against the well-being of the United States; from its very nature, it is cognizable under their authority; and, consequently, it is within the jurisdiction of this court, by virtue of the eleventh section of the judicial act.

The court being divided in opinion, it became a doubt whether sentence could be pronounced upon the defendant; and a wish was expressed by the judges and the attorney of the district that the case might be put into such a form as would admit of obtaining the ultimate decision of the Supreme Court upon the important principle of the discussion. But the counsel for the prisoner did not think themselves authorized to enter into a compromise of that nature. The court after a short consultation, and declaring that the

sentence was mitigated in consideration of the defendant's circumstances, proceeded to adjudge that the defendant be imprisoned for three months, that he pay a fine of \$200, and that he stand committed till this sentence be complied with and the costs of prosecution paid.²

SECTION 2.—CRIMINAL LAW OF THE STATES.

GUARDIANS OF THE POOR v. GREENE.

(Supreme Court of Pennsylvania, 1813. 5 Bin. 554.)

This was an action of debt in the common pleas of Philadelphia county, to recover from the defendant the penalty of \$60 prescribed by the act of the 29th of March, 1803 (4 Smith's Laws, p. 50), for refusing to take the oath of office of a guardian of the poor for the township of the Northern Liberties, or to undertake the duties of that office.

The cause was decided below in favor of the defendant in error.

TILGHMAN, C. J.³ The question in this case is whether the defendant in error, an ordained deacon and an elder in the Methodist Episcopal Church, is subject to the penalties of the act of the 29th of March, 1803 (4 Smith's Laws, p. 50), for not serving in the office of a guardian of the poor, to which he was elected. There is no doubt but the commonwealth has a right to insist on the service of every member of the community in any capacity in which it may be thought proper to exact it. But, unless the intention is clearly expressed, it is not to be supposed that services were meant to be exacted contrary to ancient usage, and involving incompatible duties.

² In 1812 the Supreme Court of the United States, in *U. S. v. Hudson*, 7 Cranch, 32, 3 L. Ed. 253, decided, without argument, that while certain implied powers to fine for contempt, imprison for contumacy, to enforce the observance of order, &c., necessarily resulted to the federal courts from the nature of their institution, the exercise of criminal jurisdiction in common-law cases was not within their implied powers. In 1816 the same point arose in *U. S. v. Coolidge*, 1 Wheat, 415, 4 L. Ed. 124. Story, J., said he did not consider the question settled by *U. S. v. Hudson*. Washington and Livingston, JJ., desired the point argued, and Johnson, J., considered the question no longer an open one; but the Attorney General refusing to argue the point, and no counsel appearing for the defendant, the Court would not review, nor draw in doubt the decision in *U. S. v. Hudson*.

These two cases have since been frequently relied on as establishing the doctrine. See *U. S. v. Britton*, 108 U. S. 179, 2 Sup. Ct. 531, 27 L. Ed. 698 (1889); *In re Greene* (C. C.) 52 Fed. 404 (1892). See for the District of Columbia, *Turner v. U. S.*, 23 App. D. C. 324 (1904).

In *U. S. v. Barnett*, Hempst, 481, Fed. Cas. No. 16,115, it was held that the act of Congress giving the Circuit Court jurisdiction in murder did not embrace the crime of accessory before the fact to murder.

³ Part of the opinion of Tilghman, C. J., and the concurring opinion of Foster, J., and dissenting opinion of Brackenridge, J., are omitted.

The case on p. 4 relates, not to the nature of the crime, but to the existence and extent of an exemption to the criminal law

The Ct. say that in England, ministers of the established church were exempt from such statutes. In the U. S., it says, this exemption has been extended by the common law of the State. (The case really stands for the principle that there is common law of the States, at least for as existing in common law.)

This is a fine, original case. Note particularly the language of the Court, speaking of the "common law of the States."

Every country has its common law. Ours is composed partly of the common law of England, and partly of our own usages. When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the Revolution, we had formed a system of our own, founded in general on the English Constitution, but not without considerable variations. In nothing was this variation greater than on the subject of religious establishments. The minds of William Penn and his followers would have revolted at the idea of an established church. Liberty to all, but preference to none; this has been our principle, and this our practice. But although we have had no established church, yet we have not been wanting in that respect, nor niggards of those privileges, which seem proper for the clergy of all religious denominations. It has not been our custom to require the services of clergymen in the offices of constables, overseers of the highways or of the poor, jurors, or others of a similar nature. Not that this exemption is founded on any act of assembly, but on a universal tacit consent. In the nature of things, it seems fit that those persons who devote their lives to the service of God and the religious instruction of their brethren should be freed from the burden of temporal offices, which would but distract their attention and may be better filled by others. This sentiment is not peculiar to us. We find it in the English common law, though from motives of policy restricted, perhaps, to the established church. It is said by Lord Coke, in 2 Inst. 3, 4, to be a principle of the ancient common law that the clergy shall not be implicated in secular business, and that if a man holding lands, by virtue of which he is bound to serve in temporal offices, become an ecclesiastical person in holy orders, he ought not to be elected to such office, and, if he is, he may have the king's writ for his discharge. And in the Register of Writs, 187, and Fitz. N. B. 175, the form of the writ is to be found. It appears, then, that what the English have applied to their established church we, in conformity to our principles of religious liberty, have granted to the clergy of all professions. Nor is the privilege confined to common-law offices. It is proved by the cases cited in the argument to which I refer that the same construction has been held with respect to offices created by statute, in which there is no express exemption of the clergy. The rule of construction is this: Unless the clergy are mentioned, it shall not be supposed that it was intended to include them. If we apply this rule to the act of assembly in question, the case will be easily decided. The act directs that a certain number of substantial householders shall be elected, but is altogether silent as to any exemptions. We must presume, then, that it was not intended to include persons who, from

ancient usage, were exempt from this kind of service, or who held other offices incompatible with the duty of a guardian of the poor. Without such presumption, how is it that judges and attorneys at law are privileged? They have no express privilege by that or any other law, but in sound construction they are excepted from the general words of the act.

My opinion is, that the court of common pleas were right in their construction of the act of assembly, and therefore their judgment should be affirmed.

JAMES v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1825. 12 Serg. & R. 220.)

This was a writ of error to the court of quarter sessions of Philadelphia county, at the September sessions of which court Nancy James, the plaintiff in error, had been convicted of being a common scold, and thereupon, on the 29th day of October, 1824, adjudged "to be placed in a certain engine of correction, called a cucking or ducking stool, and, being placed therein, to be plunged three times into the water, to pay the costs of prosecution, and stand committed till the sentence is complied with." The error assigned was "that this judgment is illegal."

DUNCAN, J.¹ This sentence, we are informed, has created much ferment and excitement in the public mind. It is considered as a cruel, unusual, unnatural, and ludicrous judgment. But whatever prejudices may exist against it, still, if it be the law of the land, the court must pronounce judgment for it. But as it is revolting to humanity, and is of that description that only could have been invented in an age of barbarism, we ought to be well persuaded, either that it is the appropriate judgment of the common law, or is inflicted by some positive law, and that that common law or statutory provision has been adopted here and is now in force.

The late Judge Ingersoll, a name respected and honored, when Attorney General, in his report to the Legislature in 1813, stated that by several acts of assembly "cruel and unnatural punishments, which tended only to harden and confirm the criminal, had been abolished for all inferior offenses." The sanguinary code of England could be no favorite with William Penn and his followers, who fled from persecution. Cruel punishments were not likely to be introduced by a society who denied the right to touch the life of man, even for the most atrocious crime. For, had they brought with them the whole body of the British criminal law, then we should have had the appeal of death, and the impious spectacle of trial by battle in

¹ Only extracts from the opinion are printed.

a Quaker colony; and it is worthy of remembrance that the charter of William Penn empowered him, with the advice and assent of the freemen, to make laws for their own government, and until this was done the laws of England in respect to real and personal property, and as to felonies, were to continue the same. Thus, as to misdemeanors, the common-law punishments were not brought over by the first settlers.

The first body of laws (called the "great body of laws") contains an act, passed in 1682, against scolding, imposing the penalty, five shillings, or three days' confinement at hard labor. Chapter 31. The second act, in 1683 (chapter 12), inflicts the same penalty, or standing one hour in the most public place, with a gag in the mouth; and 11 years after this, in 1693, in the petition of right to Gov. Fletcher, they state that the laws contained in that list had not been repealed by the king in council, and that it had pleased the king and queen so tenderly to regard their happy government as to confirm their laws and constitutions, so fitly accommodated to their circumstances, and conclude by earnestly desiring him to govern them according to these laws, including the laws against scolding; and the Governor commanded them to be enforced. These acts continued in force until 1770, when another act against scolding passed, inflicting the same penalty, of imprisonment five days at hard labor, or to be gagged and stand at some convenient place, at the discretion of the magistrate. The act of 1770 was repealed by the queen in council, but I have not been able to find the repeal of the acts of 1682 and 1683. It seems to have been the opinion of the late Judge Bradford that all in the great body of laws was repealed, and I would not venture totally to dissent from so high an authority, though I must confess I think this very doubtful. Nor do I see how, consistently with the charter, this could otherwise be repealed than by act of assembly. If they were not directly repealed, they were not virtually repealed by the repeal of the act of 1770. Whatever be the fact, the conclusion is the same—that the common-law punishment of ducking was not received nor embodied by usage, so as to become a part of the common law of Pennsylvania. It was rejected, as not accommodated to the circumstances of the country, and against all the notions of punishment entertained by this primitive and humane community; and, though they adopted the common-law doctrines as to inferior offenses, yet they did not follow their punishments. One remarkable instance I will notice: A gross libel in England was sometimes punished by the pillory. I believe Mr. Prynne lost both his ears. Though the offense is the same here, yet the sentence is very different. It is not true that our ancestors brought with them all the common-law offenses; for instance, that of champerty and maintenance this court decided in *Stoever v. Whitman's Lessee*, 6 Bin. 416, did not exist here. I do not find the rule on this subject more satisfactorily laid down anywhere than by the

Chief Justice, in *Guardians of the Poor of Philadelphia v. Greene*, 5 Bin. 558.

This is a very different question from the common-law rules of real and personal property—the modes of acquisition and alienation of estates. For, although the reasons of many of those rules have ceased, yet it might be dangerous, on that account, to abolish them, as it would lessen the security of property of titles to land, which should always be firm and stable; and by the charter they were to remain the same as in England, except when altered by the representatives of the people. But I am far from professing the same reverence for all the degrading and ludicrous punishments of the early days of the common law. I am far from thinking that this is an unbroken pillar of the common law, or that to remove this rubbish would impair a structure which no man can admire more than I do. But I must confess I am not so idolatrous a worshipper as to tie myself to the tail of this dung cart of the common law. * * * The courts of our sister states of New York and Massachusetts, governed by the same common law as we are, have declared that this strange and ludicrous punishment no longer exists with them.

In considering this question I own I have some hesitation in deciding whether the offense of *communis vexatrix* exists as indictable, but I have acceded to the opinion of the CHIEF JUSTICE and my Brother GIBSON. It is now to be considered as indictable and punishable as a common nuisance, by fine, or by fine and imprisonment, at the discretion of the court, the acts of assembly being obsolete, and the common-law punishment of ducking not being received here; and I join in the hope of a learned antiquarian and jurist of our own country “that we shall hereafter hear nothing of the ducking stool, or other remains of the customs of barbarous ages.” Duponceau on Jurisdiction, 96. It is therefore the opinion of the court that the judgment of the court of quarter sessions be reversed.

Judgment reversed.

PER CURIAM in *RESPUBLICA v. ROBERTS*, 1 Yeates, 6 (1791). The single question is whether an unmarried man may be guilty of adultery under the act of assembly.

Had the case been *res integra*, the decision of the court might be different from what it now is. It is true that practice *sub silentio* will not make the law, but it is strong evidence of what the law is. It having been the constant practice to proceed against unmarried persons for fornication, though they may have been guilty of criminal conversation with married persons, we will not exaggerate the offense, nor carry it further than our predecessors have done.

STATE v. PULLE.

(Supreme Court of Minnesota, 1866. 12 Minn. 164, [Gil. 99].)

WILSON, C. J.¹ The common law, so far as it is applicable to our situation and government, is, as a general rule, the law of this country. Every state, with perhaps one exception, has adopted it, either tacitly or by express statutory enactment. See 1 Kent's Commentaries, 470-473, note, and cases in note. That it is the law of this state, controlling both the rights and the remedies of parties in actions between individuals, either on a contract or for a tort, cannot be doubted, for the courts have recognized and acted on this fact ever since the organization of our territorial government, and we find no evidence which satisfies us that either the state or territory intended to repudiate the common law as a source of jurisdiction in either criminal or civil cases. - It having been adopted in civil cases, the presumption certainly is that it was adopted as an entirety, so far as it is not inconsistent with our circumstances, or statutory or constitutional law. Nor do the laws in force in Wisconsin Territory at the date of the admission of the state of Wisconsin (which, by our organic act were declared to be valid and operative in Minnesota Territory) rebut this presumption. There is nothing in these laws which shows that the territory of Wisconsin abrogated or repealed the common law as to crimes, but, on the contrary, we think they show that it was recognized and adopted in that territory. That our statutes expressly abolish common-law offenses is not pretended. A statute which is clearly repugnant to the common law must be held as repealing it, for the last expression of the legislative will must prevail; or we may admit, for the purposes of this case, that when a new statute covers the whole ground occupied by a previous one, or by the common law, it repeals by implication the prior law, though there is no repugnancy. Beyond this the authorities do not go in sustaining a repeal of the common law by implication. On the contrary, it is well settled that, where a statute does not especially repeal or cover the whole ground occupied by the common law, it repeals it only when, and so far as, directly and irreconcilably opposed in terms. See 1 Bish. Cr. Law (3d Ed.) §§ 195 to 200, and cases cited in notes to said sections.

Our statutes fall far short of covering the whole field of common-law crimes. It is not pretended that conspiracy is, by them, made a crime, and we think it very clear that libel is not, and many other instances might be added. We think, therefore, that they do not, by implication, abolish these crimes. But, further than this, we think our statutes clearly recognize the existence of common-law offenses. Section 2, c. 87, Comp. St. 1849-1858, reads as follows: " * * * Crimes and public offenses and criminal proceedings are modified as prescribed in these statutes." The Revised Statutes were adopted in

¹ The opinion only is printed.

1851, and the language above quoted was added as an amendment in 1852. It is perhaps true that this amendment did not change the meaning of the statutes; but legislators frequently, and properly, make use of language which, strictly speaking, is unnecessary, out of abundant caution, and for the purpose of making clear what otherwise might, in the minds of some, admit of doubt. We think, in this view, the Legislature must have used the language above quoted, to show that our statutes as to crimes were intended merely as a modification, and not as an entire repeal or abrogation, of the common law. This seems to us the fair and natural meaning of the language, and any other construction suggested seems forced and unauthorized. Section 34 of chapter 90 of said Statutes reads: "Every person who shall be convicted of any gross fraud or cheat, at common law, shall be punished," etc. Section 5, c. 98, Id., reads: "Every person who shall become an accessory after the fact, to any felony, either by common law, or by any statute made, or which shall hereafter be made, may be indicted," etc. Our statutes in no place declare that any act shall constitute the crime of libel, or that such crime shall be punished, yet they provide as to what evidence may be given, and as to the form and substance of the indictment in prosecutions for such crime. Comp. St. 1849-1858, p. 734, c. 98, § 6; Id. p. 756, c. 105, § 3; Id. p. 760, c. 105, § 17. These sections are an admission or recognition by the Legislature of the fact that common-law offenses may be punished in this state. This conclusion is in accordance with the views entertained by the courts generally throughout the United States. See authorities cited in note to 1 Bishop, Cr. Law (3d Ed.) § 36.

If common-law crimes are suspended or abolished by our statutes, so are "criminal proceedings"; but the Legislature, by the express and particular repeal of certain criminal practice and proceeding (Comp. St. 1849-1858, p. 735, c. 98, § 14; Id. p. 785, c. 118, § 37), clearly indicate that they did not consider the general statute as affecting such repeal. The gist of this offense is the unlawful confederation, and it is not necessary to prove an overt act in pursuance of it. *Commonwealth v. Judd*, 2 Mass. 329, 3 Am. Dec. 54. The exceptions are overruled.

BERRY, J. I dissent. In my judgment no offenses at common law are offenses in this state, except such as are specifically recognized by our statutes.²

² The common law, in so far as it determines what acts are crimes, is not in force in the following states: Indiana—*Jones v. State*, 59 Ind. 229 (1877); Iowa—*Estes v. Carter*, 10 Iowa, 400 (1860); Kansas—*State v. Young*, 55 Kan. 349, 40 Pac. 659 (1895); Michigan—*In re Lamphere*, 61 Mich. 105, 27 N. W. 882 (1886); Nebraska—*State v. De Wolfe*, 67 Neb. 321, 93 N. W. 746 (1903); Ohio—*Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355 (1861); Oregon—*State v. Grant*, 13 Or. 115, 9 Pac. 55 (1885).

Ecclesiastical Offenses. It is said in *Grisham & Ligan v. State*, 2 Yerg. (Tenn.) 595 (1831): "But let it be understood that the temporal courts in England have no cognizance of the crime of adultery or fornication, when secret and private and confined to single instances, yet they are not thereby

CHAPTER II.

THE ELEMENTS OF CRIME.

SECTION 1.—UNION OF INTENT AND ACT.

YOEES v. STATE.

(Supreme Court of Arkansas, 1848. 9 Ark. 42.)

Enos Yoes was indicted in Washington circuit court for an assault and battery upon James C. Hughes. He was tried on the plea of not guilty, at the May term, 1847, before Hon. Wm. W. Floyd, Judge, convicted, and fined \$10.¹

JOHNSON, C. J. The circuit court manifestly erred in giving the first instruction asked by the state. The instruction is that, if the jury believe from the evidence that the defendant went to the meeting-house yard and called Hughes out for the purpose of having a difficulty with him, they should find him guilty. A crime or misdemeanor consists in a violation of public law, in the commission of which there must be a union or joint operation of act and intention or criminal negligence. See section 1 of chapter 44 of the Revised Statutes of 1837. The mere fact of going to a place with the intention of doing an unlawful act will not of itself subject the party to the punishment denounced against such act, unless he also carries his intention into effect. If the defendant below actually made an assault upon Hughes in pursuance of his preconceived and settled intention, then it was that the motives which induced him to go to the place where Hughes was might have been legitimately inquired into in aggravation of the fine, but could not under any state of case have furnished conclusive evidence of his guilt. No valid objection is perceived to the last instruction; but for the error in giving the first the judgment must be reversed.

¹ The evidence and the charge of the court are omitted.

SECTION 2.—OFFENSES AGAINST PUBLIC JUSTICE
AND AUTHORITY.

ANONYMOUS.

(King's Bench, 1686. 3 Mod. 52.)

One was indicted for the drinking of an health to the pious memory of Stephen College, who was executed at Oxford for high treason. He was fined one thousand pounds, and had sentence to stand in the pillory, and was ordered to find sureties for his good behavior.¹

REX v. DARBY.

(King's Bench, 1687. 3 Mod. 139.)

The defendant was indicted for speaking of scandalous words of Sir John Kerle, a justice of the peace, viz.: "Sir John Kerle is a buffle-headed fellow, and doth not understand law; he is not fit to talk law with me; I have baffled him, and he hath not done my client justice." This is a scandal upon the government, and it is as much as to say that the king hath appointed an ignorant man to be a justice of peace, for which an indictment will lie.² And of that opinion was the whole court, and gave judgment accordingly.³

PENNSYLVANIA v. MORRISON.

(County Court of Allegheny, 1795. Add. 274.)

These men were indicted for having, on 18th August, 1794, unlawfully, riotously, and routously assembled together to disturb the peace, and in Market street, in Pittsburg, raised a pole or standard, called a liberty pole, in defiance of the laws of the state of Pennsylvania and of the United States, and as an indignity and insult to the Honorable James Ross, Jasper Yeates, and William Bradford, Esquires, commissioners on behalf of the United States of America, and the Honorable Thomas McKean and William Irwin, Esquires, commissioners on behalf of the state of Pennsylvania, to confer with the citizens of

¹ See also, absolving impenitent traitors, *Rex v. Cook*, Comb. 382 (1696).

² Part of this case is omitted.

³ Accord: *Anon.*, Comb. 46 (1688); *Rex v. Collier*, 1 Wils. 332 (1752). But see *Reg. v. Wrightson*, 11 Mod. 166 (1708); *Rex v. Weltje*, 2 Camp. 142 (1809).

the counties west of the Alleghany mountains, to the great disturbance of the peace, and to the ill example of others.¹

PRESIDENT. Pole raising was a notorious symptom of dissatisfaction, and the exhibition of this, in the only part of the country where government was supposed to have strength, must have made an impression very unfavorable to the whole country, promoted violence in the people here, and induced force on the part of the government.

Verdict—guilty, except as to White and McWilliams.

REX v. WILLIAMS.

(King's Bench, 1762. 3 Burr. 1317.)

An information was granted by the court against the defendants, as justices of the peace for the borough of Penryn, for refusing to grant licenses to those publicans who voted against their recommendation of candidates for members of Parliament for that borough. It appeared that they had acted very grossly in this matter, having previously threatened to ruin these people, by not granting them licenses, in case they should vote against those candidates whose interests those justices themselves espoused, and afterwards actually refusing them licenses upon this account only. And Lord Mansfield declared that the court granted this information against the justices, not for the mere refusing to grant the licenses (which they had a discretion to grant or refuse, as they should see to be right and proper), but for the corrupt motive of such refusal, for their oppressive and unjust refusing to grant them, because the persons applying for them would not give their votes for members of Parliament as the justices would have had them.²

COMMONWEALTH v. McHALE.

(Supreme Court of Pennsylvania, 1881. 97 Pa. 407.)

PAXSON, J.³ The indictment against Anthony McHale contains three counts. In the first count it is charged that, "intending to procure a false count and return of the votes cast by the electors," etc., he did "make false and fraudulent entries in the books kept by the clerks at said election in said election district, which books are commonly known as the list of voters, of the names of divers persons,

¹ Part of this case is omitted.

² Accord: *Commonwealth v. Alexander*, 4 Hen. & M. (Va.) 522 (1808), corruption in office; *Commonwealth v. Callaghan*, 2 Va. Cas. 460 (1825), being intoxicated while in discharge of office.

³ Part of the opinion is omitted.

to wit, twenty-one persons, whose names are as follows," etc. The second count charges that, with like intent, he did "deposit, among the ballots cast at said election in said election district by the electors voting thereat, false and fraudulent ballots of a large number, to wit, twenty-one ballots," etc. The third count charges that, with like intent, he did, "with the connivance of the election officers holding said election, undertake and assume to count the ballots cast by the electors voting at said election in said election district, and did falsely, fraudulently, maliciously, and unlawfully make a false and fraudulent count of said ballots as to make it appear that two hundred and eleven votes were deposited for one Adolph W. Schalck for the office of district attorney, when in truth and in fact he did not receive more than one hundred and eighty-five votes," etc.

Some of these offenses, perhaps all of them, are indictable under the act of 1839 and its supplements, when committed by election officers. The defendants were not election officers; at least, they were not indicted as such.

It must be conceded that offenses which strike at the purity and fairness of elections are of a grave character. Are they indictable at the common law? This is a serious, and at the same time comparatively new, question. In considering it, we have little in the way of authority to guide us.

It was assumed by the learned counsel for the defendants that an indictment will not lie at common law for such acts. In their printed argument they dismiss the subject with this brief remark: "Offenses against the election laws are unknown to the common law. They are purely and exclusively of statutory origin." It may safely be admitted that, if the question depends upon the fact whether a precise definition of this offense can be found in the text-books, or perhaps in the adjudged English cases, the law is with the defendants. This, however, would be a narrow view, and we must look beyond the cases and examine the principles upon which common-law offenses rest. It is not so much a question whether such offenses have been so punished as whether they might have been.

What is a common-law offense?

The highest authority upon this point is Blackstone. In chapter 13, vol. 4, of Sharswood's edition, it is thus defined: "The last species of offenses which especially affect the commonwealth are those against the public police or economy. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding series. These

amount, some of them to felony, and others to misdemeanors only." The learned author then proceeds to define certain offenses of both classes, which are among the crimes against the public police or economy. The felonies I will omit. The misdemeanors are: (1) Common or public nuisances, of which a large variety are given, commencing with obstruction to public highways and ending with common scolds. (2) Idleness. (3) Sumptuary laws. (4) Gaming. (5) Destroying game. These, as the text shows, are but illustrations. A large number of these and other common-law offenses are now, and have for many years been regulated by statute in England. But in most instances the statute is merely declaratory of the common law, the object being to define the crime with greater accuracy or to increase the punishment.

The above quotation from Blackstone is in harmony with other text writers. We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is, not whether precedents can be found in the books, but whether they injuriously affect the public police and economy.

It needs no argument to show that the acts charged in these indictments are of this character. They are not only offenses which affect public society, but they affect it in the gravest manner. An offense against the freedom and purity of elections is a crime against the nation. It strikes at the foundations of republican institutions. Its tendency is to prevent the expression of the will of the people in the choice of rulers, and to weaken the public confidence in elections. When this confidence is once destroyed the end of popular government is not distant. Surely, if a woman's tongue can so far affect the good of society as to demand her punishment as a common scold, an offense which involves the right of a free people to choose their own rulers in the manner pointed out by law is not beneath the dignity of the common law, nor beneath its power to punish. The one is an annoyance to a small portion of the body politic; the other shakes the social fabric to its foundations.

We are of opinion that the offenses charged in these indictments are crimes at common law. We regard the principle thus announced as not only sound, but salutary. The ingenuity of politicians is such that the offenses against the purity of elections are constantly liable to occur which are not specifically covered by statute. It would be a reproach to the law were it powerless to punish them.

It follows from what has been said that it was error to quash the indictments.

The judgment is reversed in each case, and a procedendo awarded.²

² Accord: Attempt to influence a public officer by offer of a reward, *State v. Ellis*, 33 N. J. Law, 162, 97 Am. Dec. 707 (1868); prison breach, *State v. Board*, 7 Conn. 385 (1820); disobeying an order of a justice, *Rex v. Gilkes*, 3 Car. & P. 32 (1827); rescue, *State v. Murray*, 15 Me. 100 (1838); refusal to assist officer, *Comfort v. Commonwealth*, 5 Whart. (Pa.) 437 (1840); preventing

attendance of witness or juror, *State v. Carpenter*, 20 Vt. 9 (1847); refusing to accept office, *Attorney General v. Read*, 2 Mod. 299 (1678). But see *State v. McEntyre*, 25 N. C. 171 (1842).

Other offenses against public justice are:

BARRATRY.—"A barrator is a common mover, exciter, or maintainer of suits or quarrels, either in court or in the country." Hawk. P. C. (Curw. Ed.) 474. See *Commonwealth v. McCulloch*, 15 Mass. 227 (1818).

MAINTENANCE.—"An unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right." Hawk. P. C. (Curw. Ed.) 454. See *Key v. Vattier*, 1 Ohio, 132 (1823).

CHAMPERTY.—"The unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it." Hawk. P. C. (Curw. Ed.) 463. See *Thompson v. Reynolds*, 73 Ill. 11 (1874).

MISPRISION OF FELONY.—"Misprision of felony is taken for a concealment of felony, or a procuring of the concealment thereof, whether it be felony by the common law, or by statute." 1 Hawk. P. C. (Curw. Ed.) 73.

COMPOUNDING OF CRIMES.—Compounding a crime is agreeing to take compensation for forbearing to prosecute a person who has committed a crime. Receiving a promissory note is sufficient consideration to constitute this element of the offense, though the note may never be paid. *Commonwealth v. Pease*, 16 Mass. 91 (1819). It is no defense to an indictment for compounding that the defendant did in fact afterward prosecute the guilty person, *State v. Duhammel*, 2 Har. (Del.) 532 (1836); *State v. Ash*, 33 Or. 86, 54 Pac. 184 (1898); or that the person whose alleged crime the defendant is charged with compounding was acquitted of such crime, *People v. Buckland*, 13 Wend. (N. Y.) 592 (1835); or that the defendant (a police officer) was corruptly acting under the instructions of a superior, *State v. Ash*, 33 Or. 86, 54 Pac. 184 (1898); or that the defendant took the consideration for the benefit of another, *State v. Ruthven*, 58 Iowa, 121, 12 N. W. 235 (1882), *State v. Ash*, 33 Or. 86, 54 Pac. 184 (1898).

EMBRACERY.—"Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like." 4 Bl. Com. 140. See *Gibbs v. Dewey*, 5 Cow. (N. Y.) 503 (1826); *Caruthers v. State*, 74 Ala. 406 (1883). As embracery is itself only an attempt, there can be no indictment for an attempt to commit it. *State v. Sales*, 2 Nev. 268 (1866).

OBSTRUCTING OFFICERS.—Obstructing or resisting an officer in the lawful discharge of his official duties is a criminal offense. See *Montgomery v. Sutton*, 58 Iowa, 697, 12 N. W. 719; *State v. Bates*, 23 Iowa, 96 (1867); *People v. Clements*, 68 Mich. 655, 36 N. W. 792, 13 Am. St. Rep. 373 (1888).

ESCAPE AND PRISON BREACH.—"The escape of a person (lawfully) arrested, by eluding the vigilance of his keepers before he is put in hold or in prison, is an offense against public justice." 4 Bl. Com. 129. See *State v. Doud*, 7 Conn. 385 (1829).

CONTEMPTS.—"Contempts * * * are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create a universal disregard of their authority." 4 Bl. Com. 284.

SECTION 3.—OFFENSES AGAINST THE LAW OF NATIONS.

RESPUBLICA v. DE LONGCHAMPS.

(Oyer and Terminer of Philadelphia, 1784. 1 Dall. 111, 1 L. Ed. 59.)

McKEAN, Chief Justice.¹ Charles Julian De Longchamps: You have been indicted for unlawfully and violently threatening and menacing bodily harm and violence to the person of the Honorable Francis Barbe de Marbois, secretary to the legation from France, and consul general of France to the United States of America, in the mansion house of the minister plenipotentiary of France, and for an assault and battery committed upon the said secretary and consul in a public street in the city of Philadelphia. To this indictment you have pleaded that you were not guilty, and for trial put yourself upon the country. An unbiased jury, upon a fair trial and clear evidence, have found you guilty.

The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers.

The person of a public minister is sacred and inviolable. Whoever offers any violence to him not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations. He is guilty of a crime against the whole world.

All the reasons which establish the independency and inviolability of the person of a minister apply likewise to secure the immunities of his house. It is to be defended from all outrage. It is under a peculiar protection of the laws. To invade its freedom is a crime against the state and all other nations.

The comites of a minister, or those of his train, partake also of his inviolability. The independency of a minister extends to all his household. These are so connected with him that they enjoy his privileges and follow his fate. The secretary to the embassy has his commission from the sovereign himself. He is the most distinguished character in the suite of a public minister, and is in some instances considered as a kind of public minister himself. Is it not, then, an extraordinary insult to use threats of bodily harm to his person in the domicile of the minister plenipotentiary? If this is tolerated, his freedom of conduct is taken away, the business of his sovereign cannot be transacted, and his dignity and grandeur will be tarnished.

You, then, have been guilty of an atrocious violation of the law of nations; you have grossly insulted gentlemen, the peculiar objects of

¹ Part of this case is omitted.

this law (gentlemen of amiable characters, and highly esteemed by the government of this state), in a most wanton and unprovoked manner. And it is now the interest as well as duty of the government to animadvert upon your conduct with a becoming severity—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honor of the state, and maintain peace with our great and good ally and the whole world.

A wrong opinion has been entertained concerning the conduct of Lord Chief Justice Holt and the Court of King's Bench, in England, in the noted Case of the Russian Ambassador. They detained the offenders, after conviction, in prison from term to term until the Czar Peter was satisfied, without ever proceeding to judgment; and from this it has been inferred that the court doubted whether they could inflict any judgment for an infraction of the law of nations. But this was not the reason. The court never doubted that the law of nations formed a part of the law of England, and that a violation of this general law could be punished by them; but no punishment less than death would have been thought by the Czar an adequate reparation for the arrest of his ambassador. This punishment they could not inflict, and such a sentence as they could have given he might have thought a fresh insult. Another expedient was therefore fallen upon. However, the princes of the world at this day are more enlightened, and do not require impracticable nor unreasonable reparations for injuries of this kind.

The second offense charged in the indictment, namely, the assault and battery, needs no observations.

Upon the whole, the court, after a most attentive consideration of every circumstance in this case, do award, and direct me to pronounce, the following sentence:

That you pay a fine of 100 French crowns to the commonwealth; that you be imprisoned until the 4th day of July, 1786, which will make a little more than two years' imprisonment in the whole; that you then give good security to keep the peace and be of good behavior to all public ministers, secretaries to embassies, and consuls, as well as to all the liege people of Pennsylvania, for the space of seven years, by entering into a recognizance, yourself in £1,000, and two securities in £500 each; that you pay the costs of this prosecution, and remain committed until this sentence be complied with.

SECTION 4.—OFFENSES AGAINST RELIGION.

 REX v. TAYLER.

(King's Bench, 1676. 3 Keb. 607.)

An information by Mr. Attorney Jones for saying, Christ is a Whoremaster, and Religion is a Cheat, and profession a Cloak, and all Cheats, all are mine, and I am a King's Son, and fear neither God, Devil, nor man; I am Christ's younger Brother (proved by three witnesses), and that Christ is a Bastard, and damn all Gods of the Quakers, &c. In destruction of Society and Religion, and contempt, &c. None fears God but an hypocrite, proved by one.

HALE, C. J. These words though of Ecclesiastical cognizance, yet that Religion is a cheat, tends to dissolution of all Government, and therefore punishable here, and so of contumelious reproaches of God, or the Religion establish'd; which the Court agreed and adjudged. An Indictment lay for saying the Protestant Religion was a fiction for taking away Religion, all obligation to Government by Oaths, &c., ceaseth, and Christian Religion is a part of the law itself, therefore injuries to God are as punishable as to the King, or any common person. Verdict, *pro Rege*.¹

 SECTION 5.—OFFENSES AGAINST PUBLIC PEACE.

 REX v. SUMMERS.

(King's Bench, 1701. 3 Salk. 194.)

The defendant was indicted at the sessions, for writing a scandalous letter to one Mellith concerning a young woman whom he intended to marry. Upon not guilty pleaded, he was found guilty; and afterwards he brought a writ of error, and the error assigned was that this was a private letter, for which he was not punishable by way of indictment; or, if an indictment would lie, yet not before the justices of the peace at their sessions. *Sed per curiam*, this is an offense, and indictable before the justices in sessions, because it tends to the breach of the peace.²

¹ Accord: *Rex v. Woolston*, 2 Str. 834 (1765); *People v. Ruggles*, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335 (1811); *Updegraph v. Commonwealth*, 11 Serg. & R. (Pa.) 394 (1821). See, also, disturbing religious meeting, *State v. Jasper*, 15 N. C. 323 (1833); burning Bibles, *Reg. v. Petcherini*, 7 Cox, C. C. 79 (1855).

² Accord: Sending challenge to fight, *Rex v. Phillips*, 6 East, 464 (1805).

COMMONWEALTH v. HAINES.

(Supreme Court of Pennsylvania, 1824. 4 Clark, 17.)

This was a case removed by certiorari to the Supreme Court from the mayor's court of Philadelphia, and tried before Gibson, J., at nisi prius, in September, 1824.

The first count of the indictment charged that the defendant, devising and intending to raise and create riots, etc., with the usual averments, "unlawfully, wickedly, and maliciously incited, encouraged, and endeavored to provoke and instigate divers good citizens of the commonwealth, whose names are to said inquest unknown," etc., "to assemble and gather together to disturb the peace of the commonwealth, and to injure and annoy said citizens, etc., and that for that purpose, he, the said defendant, then and there erecting and fixing a certain figure, resembling a man, commonly called a Paddy, as and for the effigy of St. Patrick, and by these means, etc., did collect together a large number of citizens, who behaved riotously for a long space of time," etc. The remaining counts were for attempts to produce riot generally, without specifying the means. It appeared from the evidence that some time between dusk and 11 o'clock on the 16th of March, 1824, a stuffed Paddy, with the accompaniment of a rum bottle and a string of potatoes, was suspended to a tree near the junction of Second street and Germantown Road, in the district of Kensington, a neighborhood inhabited principally by emigrants from Ireland. The figure remained in this position until the next morning, when it was removed to prevent a disturbance, which seemed likely to ensue. The defendant, an innkeeper residing in that district, was proved by several witnesses to have been in his house during the whole of the evening on which the Paddy was erected, and a great deal of conflicting evidence was produced, which made his agency in the affair very questionable. The averment in the indictment that the figure was intended as an effigy of St. Patrick, and was meant and well calculated to excite the angry feelings of the immediate population, was fully supported. It was proved, also, beyond contest, that the defendant was concerned in the exhibition on the 18th of March, of a female figure, commonly called a Shelah, but with several features, beside that of sex, distinguishing it from a Paddy. Some evidence was offered to show, also, that, while the exhibition of a Paddy was resented as an insult upon the Catholic portion of the Irish, a Shelah was often displayed as a retaliatory emblem, and may have been so meant in the present case. A tumult ensued, the insult being spiritedly resented, and the neighborhood was thrown into confusion thereby for several succeeding weeks. The defendant, it was conceded, was clearly connected with the Shelah, though his instrumentality in the Paddy was controverted.

The jury having been addressed by Randall and Kittera for the prosecution, and Biddle and D. P. Brown for the defense, were charged substantially as follows, by

GIBSON, J. The offense specified in the first count is clearly indictable at common law. No man has a right to trifle with the feelings of any large class of men, so as to provoke them to a breach of the peace. If it is done by libel, no one doubts it is a misdemeanor. If it is done by effigy, is it less so? Suppose the defendant had published a picture of the same character and with the same tendency as the figure which is the subject of the present offense; would it not be held a libel? The gist of the offense is its tendency to provoke a breach of the peace. It may be indiscreet in the Irish residents of the district to take notice of acts of the kind, but it is worse than indiscreet in others to provoke them to do so. The facts are with you exclusively. If you believe the allegation of the indictment to be supported by the evidence, you will be bound to convict.

A verdict of acquittal was subsequently rendered.

Other acts indictable at common law, as against the public peace, are:

Riot.—Which is defined to be: "A tumultuous disturbance of the peace, by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." 1 Hawk. P. C. (Curw. Ed.) 513. See *Reg. v. Cunningham*, 16 Cox, C. C. 420 (1888).

UNLAWFUL ASSEMBLY.—"Any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects." 1 Hawk. P. C. (Curw. Ed.) p. 516, c. 28. See *Reg. v. Vincent*, 9 Car. & P. 91 (1839).

AFFRAY.—"The fighting of two or more persons in some public place, to the terror of his majesty's subjects." 4 Bl. Com. 145. See *State v. Sumner*, 5 Strob. (S. C.) 53 (1850).

REX v. SMITH.

(King's Bench, 1725. 1 Strange, 704.)

The defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighborhood, which the court held to be a nuisance, and fined the defendant £5.¹

¹ Compare *Commonwealth v. Edwards*, 1 Ash. 46 (1823); *Commonwealth v. Wing*, 9 Pick. (Mass.) 1, 19 Am. Dec. 347 (1829); *Kilpatrick v. People*, 5 Denio (N. Y.) 277 (1848); *Henderson v. Commonwealth*, 8 Grat. (Va.) 708, 56 Am. Dec. 166 (1852); *State v. Schlottman*, 52 Mo. 164 (1873); *Ware v. Loveridge*, 75 Mich. 488, 42 N. W. 997 (1889).

COMMONWEALTH v. CRAMER.

(Court of Quarter Sessions of Dauphin, 1870. 2 Pears. 441.)

By THE COURT. The defendant was charged, under the 154th section of the Penal Code (P. L. 1860, p. 419), with having willfully and maliciously maimed, disfigured, and wounded a steer, the property of Jonas C. Brinzer, and, having been convicted at the last sessions, a motion was made for a new trial on account of misdirection in the charge of the court and also in arrest of judgment. There is no ground whatever for arresting the judgment, as the indictment is good on its face. The only question is, was it properly supported by the evidence, and was the jury rightly instructed as to the law of the case?

It was proved on the trial that at the time of the injury the steer was trespassing on the inclosed grounds of the defendant; had repeatedly jumped into his cornfield, and was destroying his corn; that he was very troublesome, addicted to jumping, and what might be called in common parlance "very breachy." The defendant shot him many times with a gun heavily loaded with shot, at one time wrapping up the charge and hitting him so severely that he fell to his knees, but was able to run off and again jump the fence, which was low and not in good order. The steer was neither maimed nor disfigured, but was pretty severely "wounded" by the shots, and greatly fell away in flesh. The court instructed the jury that the evidence did not bring the case within the statute, but, if he was wounded as charged in the indictment, it was a crime at common law, although concluding *contra formam statuti*. The only question of any difficulty was whether the act must be done out of malice towards the owner, or malice and passion against the animal. There was no pretense that there was any malice towards the owner in this case, as the parties were comparative strangers to each other and lived many miles apart. The prosecutor's cattle were pasturing on an adjoining farm to the defendant.

It is a little difficult to ascertain precisely what amounts to malicious mischief by the common law. Blackstone, in his Commentaries (volume 4), says: "The act must be done either out of a spirit of wanton cruelty, or black and diabolical revenge." One reason why we find so little on the subject in the English writers on criminal jurisprudence tending to show what amounted to this crime at common law is that almost every possible injury to property was punished by statutes, and the indictments have generally, and perhaps always, for the last 200 years, been preferred under some one of the various acts of Parliament. It may be conceded that in England it is settled that the offense must be committed out of malice towards the owner of the injured property, unless, perhaps, in cases of great and wanton cruelty towards domestic animals. Even under their statutes it is

held that there must be malice towards the owner. The worst acts of cruelty committed through passion against the animal are not punished criminally. In this state, and perhaps in many others, our laws have been construed differently. When our various acts passed to protect property of any kind speak of malicious and willful injury thereto, we are justifiable in saying that it applies to the forbidden act, whether done out of malice toward the owner, or through a spirit of wanton mischief, especially if accompanied with cruelty. Where malice is thus mentioned, it does not mean hatred or ill will, but imports an evil disposition in general, a heart regardless of social duty. Our Code is full of provisions protecting inanimate objects, as well as animate, and we hold that they are equally protected from wanton mischief, or from injury or destruction out of malice towards the owner. Wharton, our best writer on Criminal Law in this state, says, in volume 2, at page 2002: "Malicious mischief in this country as a common-law offense has received a far more extended interpretation than has been attached to it in England." He defines it to be "any malicious or mischievous injury, either to the rights of another or those of the public in general." In *Commonwealth v. Walden*, 3 Cush. (Mass.) 558, it is said: "The jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge." In Massachusetts the distinction seems to be taken between injuries done to animate and inanimate objects. In the latter there must be malice towards the owner, whilst in the former wanton cruelty is criminally punishable. It was held in that state to be indictable to poison cattle. *Commonwealth v. Leach*, 1 Mass. 59.

The subject has undergone considerable examination in the state of New York. In *People v. Smith*, 5 Cow. (N. Y.) 258, "it is held to be indictable to maliciously, wickedly, and willfully kill a cow." The court speaks of the act being one of wanton cruelty, and that it cannot be expected that a mind so depraved will be restrained by a mere liability to pay damages. The perpetrator may be insolvent, and thus gratify his malice with impunity, if there is no redress other than by civil action. The object is to protect the citizen in his right by restraining and punishing the wrongdoer. Such acts discover a degree of moral turpitude dangerous to society, and for its security ought to be punishable criminally. It is an evil example of the most pernicious tendency, inasmuch as the act is an outrage upon the principles and feelings of humanity.

In *Loomis v. Edgerton*, 19 Wend. (N. Y.) 419, it was held to be indictable to willfully, wickedly, and secretly break up a cutter, and *People v. Smith*, 5 Cow. (N. Y.) 258, is cited with approbation. The judge, after stating that in many courts it had been held that such offenses were not indictable, says he "is happy to find that the weight of authority is the other way." "To say that it was not so would be a sad exception to the general wisdom of the common law." At an after time the courts of that state decided in *Kilpatrick v. People*, 5

Denio, 277, that it was not indictable at common law to maliciously break the windows of another's dwelling. If done secretly, it might be otherwise. At the same time the court considers that a criminal prosecution might be sustained for maliciously killing or wounding domestic animals, as that shows depravity of mind and cruelty of disposition, and the cases in 1 Dall. (Pa.) 335, 1 L. Ed. 163, *Respublica v. Teischer*, and 5 Bin. (Pa.) 277, *Commonwealth v. Taylor*, are spoken of with approbation, as also that already cited from 5 Cow.

In *State v. Briggs*, 1 Aikens (Vt.) 226, an indictment was sustained for cutting, maiming, and destroying colts. The judge says: "When the most wanton cruelty to the beast is the grievance, we may pass by the civil injury and treat the deed as a misdemeanor at common law. With force and arms to injure the property of another is a civil injury, for which the owner of the property may have his action of trespass. But the wounding and torturing a living animal, not only with force and arms, but with all the malicious and wicked motives and intentions set forth in this indictment, is a misdemeanor to be prosecuted by the judges." This case appears afterwards to have been disregarded and overruled in that state, but in our opinion is good law and sound morals.

In Pennsylvania we have perhaps gone further than in any other state in punishing malicious mischief. As early as 1788, in *Teischer's Case*, 1 Dall. 335, 1 L. Ed. 163, it was held indictable to maliciously, willfully, and wickedly kill a horse, and McKean, C. J., says whatever amounts to a public wrong may be made the subject of an indictment. The poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, and many other offenses of a similar description have heretofore been indicted. Breaking windows by throwing stones at them, embezzling public money, so for maliciously killing a dog, for writing threatening letters to obtain money, *United States v. Ravara*, 2 Dall. (Pa.) 297, Fed. Cas. No. 16,122, 1 L. Ed. 388; girdling a tree growing on public ground, *Commonwealth v. Eckert*, 2 Browne (Pa.) 249; so to enter the house of another, make a great noise, and disturb and alarm the family (5 Bin.); to be guilty of wanton cruelty to animals in general, *United States v. Logan*, 2 Cranch, C. C. (U. S.) 259, Fed. Cas. No. 15,623; to put cowitch on a towel to injure a person about to use it, *People v. Blake*, 1 Wheeler, Cr. Cas. (N. Y.) 490; to cut off the hair from the mane or tail of a horse, *Boyd v. State*, 2 Humph. (Tenn.) 39; to discharge a gun with intent to disturb a sick person, *Commonwealth v. Wing*, 9 Pick. (Mass.) 1, 19 Am. Dec. 347; so to destroy a line tree or other landmark, or to set fire to a number of barrels of tar belonging to another; so to cast the carcass of a dead animal into a well in daily use, *State v. Buckman*, 8 N. H. 208, 29 Am. Dec. 646. Most of these cases are cited in 2 Wharton's Cr. Law, p. 2003.

In the case before us the owner of the cornfield could have had ample redress for the injury done by the steer, had he proceeded un-

der the law relating to estrays or by an action against the owner. Instead of pursuing a legal remedy, he resorted to acts of barbarity which are themselves evidence of malice. Although we may, in pronouncing sentence, take into consideration the provocation to anger by the trespasses of the animal, yet we cannot avoid imposing some punishment on the defendant for his violation of the criminal law.

SECTION 6.—OFFENSES AGAINST PUBLIC HEALTH.

REX v. TAYLOR.

(King's Bench, 1742. 2 Strange, 1167.)

THE COURT granted an information against him as for a nuisance, on affidavits of his keeping great quantities of gunpowder, to the endangering the church and houses where he lived.¹

REX v. VANTANDILLO.

(King's Bench, 1815. 4 Maule & S. 73.)

The defendant was indicted for carrying her child while infected with the smallpox along a public highway.

Owen moved in arrest of judgment, that this was an indictment of the first impression. He observed that the defendant was not indicted for inoculating, or causing the child to be inoculated, with an infectious disease; for it is not stated how the child came by it. And it is consistent with this indictment that the child might have caught the disease; and, supposing it had, might not the mother carry it through the street in order to procure medical advice without being subject to be indicted for it? Therefore the indictment ought to have shown that the act was unlawful, and ought also to have alleged that there was some sore upon the child at the time when it was so carried, by analogy to the writ "*de leproso amovendo*," which, it seems, lay only for those who appeared to the sight of all men by their voice and sores to be lepers, and not for those infected with the disease, but not outwardly in their bodies. See Fitz. N. B. 534. And if the merely alleging that the disorder is infectious and dangerous to the subjects be sufficient, there is a multitude of diseases

¹ Accord: *Reg. v. Lister*, Dears. & B. 209 (1856). Cf. *People v. Sands*, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296 (1806). Obstructing navigable river. *State v. Thompson*, 2 Strob. (S. C.) 12, 47 Am. Dec. 588 (1847); obstructing highway, *Reading v. Commonwealth*, 11 Pa. 196, 51 Am. Dec. 534 (1849); maintaining slaughter house near dwelling, *Moses v. State*, 58 Ind. 185 (1877).

of which the same may be predicated, and consequently the patient during the continuance of any such disease must never go abroad at all, so difficult will it be to draw the line. The only offenses against the public health of which Hawkins speaks are spreading the plague and neglecting quarantine (Hawk. P. C. cc. 52, 53); and Lord Hardwicke, it appears, thought the building of a house for the reception of patients inoculated with the smallpox was not a public nuisance, and mentioned that upon an indictment of that kind there had lately been an acquittal. And he added that the fears of mankind, though they may be reasonable, will not create a nuisance (3 Atk. 750).¹

LE BLANC, J., in passing sentence, observed that although the court had not found upon its records any prosecution for this specific offense, yet there could be no doubt in point of law that if a person unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects, and indictable as such. However, the court was not disposed upon the present occasion to impute to the defendant an intention of being the cause of the consequences which had followed. Neither did they pronounce that every person who inoculated for this disease was guilty of an offense, provided it was done in a proper manner, and the patient was kept from the society of others, so as not to endanger a communication of the disease. In such a case the law did not pronounce it to be an offense. But no person having a disorder of this description upon him ought to be publicly exposed, to the endangering the health and lives of the rest of the subjects.

The defendant was sentenced to imprisonment in the custody of the marshal for three calendar months.²

SECTION 7.—OFFENSES AGAINST TRADE.

RESPUBLICA v. POWELL.

(Supreme Court of Pennsylvania, 1780. 1 Dall. 47, 1 L. Ed. 31.)

This was an indictment against the defendant, a baker employed by the army of the United States, for a cheat, in baking 219 barrels of bread, and marking them as weighing 88 pounds each, whereas

¹ The indictment, argument of counsel for the crown, and concurring opinion of Ellenborough, C. J., are omitted.

² Accord: Selling unwholesome food, *Rex v. Dixon*, 3 M. & S. 11 (1814); throwing carcass into a well, *State v. Buckman*, 8 N. H. 203, 29 Am. Dec. 646 (1836); bringing horse infected with glanders into a public place, *Reg. v. Henson*, 1 Dears. 24 (1852); selling unwholesome water, *Stein v. State*, 37 Ala. 123 (1861); circulation of false report that a kidnapper is in the neighborhood, *Commonwealth v. Cassidy*, 6 Phila. (Pa.) 82 (1865).

they only severally weighed 68 pounds. The indictment being originally found at the city court, in October sessions, 1779, was removed by certiorari into this court.

And now Lewis for the defendant, contended that false tokens are only indictable by St. 33 Hen. VIII, c. 1, which has no operation in Pennsylvania, and he cited 3 Burr. 1697; 1 Burn. 291; 2 Sess. Ca. 2.

The Attorney General (Sergeant) insisted that the defendant's office was a public trust, and cited 2 Burr. 1125; 1 Hawk. 187.

THE COURT said that this was clearly an injury to the public, and the fraud the more easily to be perpetrated, since it was the custom to take the barrels of bread at the marked weight, without weighing them again. The public, indeed, could not by common prudence prevent the fraud, as the defendant was himself the officer of the public *pro hac vice*. They were therefore of opinion that the offense was indictable.

STATE v. MIDDLETON.

(Court of Appeals of South Carolina, 1838. Dud. 275.)

O'NEALL, J., delivered the opinion of the court.¹

The indictment charges the defendant in three counts, as follows, to wit: (1) That she did overreach. (2) That she did cheat. (3) That she did defraud one Alexander L. Gregg of sundry articles of property, by passing to him a promissory note on one L. G. Smith and John Foxworth for \$10, pretending that it was of that value, and that the makers were in law liable to pay and would pay the same, when she in fact knew that they were not liable to pay and would not pay the same. This is the substance of the charges.

The first inquiry arises, is any offense at common law charged? I think it is very clear there is not. It is a mere civil injury, for which the party injured might have his remedy by action of deceit. It is a mere false representation of a thing to be of value, which the defendant knew to be valueless. There is in this no offense against the public. It is in its consequences and effects confined to the parties to the transaction, and thus at once shows that no prosecution at common law can be sustained. The definition of a cheat at common law, given by Russell, in his second volume (139), the fraudulent obtaining of property of another, by any deceitful and illegal practice or token (short of felony) which affects or may affect the public, seems to give, in general terms, the most proper notion of the offense which I have been able to meet with. It has the support of the case of *Rex v. Wheatly*, 2 Burr. 1125, in which the defendant was indicted for selling 16 gallons of amber, when it had been represented

¹ Argument of counsel and part of the opinion, construing the act of 1791, are omitted.

by him at 18 gallons, and sold accordingly; the defendant well knowing that the true quantity was 16 gallons. It was held that this was no offense, and that the judgment must be arrested. In that case Lord Mansfield stated the rule to be that "the offense that is indictable must be such a one as affects the public—as if a man uses false weights and measures, and sells by them to all or many of his customers, or uses them in the general course of his dealings; so if a man defrauds another under false tokens. For these are deceptions that common care and prudence cannot guard against."

It is therefore now necessary, in this connection, to inquire what is a false token. It is somewhat difficult to define with precision, or rather to describe, a false token in all cases. Taking the preamble of the statute as our guide, we would say it must be something false, and purporting to come from one not the bearer, and having in itself some private mark or sign, calculated to induce the belief that it is real, and thus to cause the person to whom it is delivered to part with his money or goods to the bearer or person delivering it. On looking into 2 Russell, 1384, I find the definition which I have given is substantially that which he approves. This would be enough for this part of the case, for it is manifest that the note set out in the indictment could not be a privy false token, according to the definition or description which has been given. But it may be well here to notice what is meant by a false token at common law; for it will, perhaps, aid us in the view which we may have to take of this case under the act of 1791. It seems to me that it is anything which has the semblance of public authority, as false weights, measures, seals, and marks of produce and manufactures, false dice, marked cards, and things of a similar kind, false and deceptive, used in unlawful games. 2 Russ. on Crimes, 1368. It is true, in looking into the books, we find many cases of indictment in which fraud is an essential requisite, as in cases of common cheat, forgery, and conspiracy; and some confusion has arisen from such cases being often spoken of under the general head of cheats at common law, and therefore mingled with the offense of cheating or swindling by false tokens. But each of them constitutes an independent and distinct offense.

The motion in arrest of judgment is granted.²

² Accord: See, also, *Commonwealth v. Warren*, 6 Mass. 72 (1800); *Rex v. Haynes*, 4 M. & S. 214 (1815); *Commonwealth v. Gallagher*, 4 Pa. Law J. 58 (1844).

SECTION 8.—OFFENSES AGAINST PUBLIC DECENCY.

BELL v. STATE.

(Supreme Court of Tennessee, 1851. 1 Swan, 42.)

McKINNEY, J., delivered the opinion of the court.

The plaintiff in error was indicted and convicted in the circuit court of Blount for the utterance of certain grossly obscene words in public, and in the hearing of divers persons, in the town of Louisville, in said county. The different words alleged to have been spoken are set forth in three different counts. This was necessary to the validity of the indictment, but we omit to repeat them here, because of their extremely vulgar and offensive character. It is sufficient to state that they relate to acts of criminal intercourse alleged by the defendant to have taken place between him and the daughters of Abraham Hartsell, and to a loathsome disease, said by the defendant to have been contracted by him from the wife of Hiram Hartsell.

Two questions are presented for our determination: First, is the utterance of obscene words, in public, an indictable offense? And, if so, secondly, are the words proved sufficient to support the charges in the indictment?

Upon the first point the argument for the plaintiff in error rests upon the narrow and unsubstantial ground that no precedent or adjudication has been found in support of such an indictment. Admitting this to be true for the present, what does it establish?

If the case stated in the indictment falls within the operation of clear, well-defined, and well-established principles of law, is it to be urged against the maintenance of this prosecution that no similar case has heretofore occurred calling for the like application of such principles? Surely not, at this day. Are not innumerable instances to be found in the modern Reports, both of England and America, in which the liberal, enlightened, and expansive principles of the common law have been adapted and applied to new cases, for which no precedents were to be found, so as to meet the ever-varying condition and emergencies of society? And this must continue to be so, unless a stop be put to all further progress of society, and unless a stop be also put to the further workings of depraved human nature, in seeking out new inventions to evade the law.

What, then, are the well-established principles of the common law applicable to the present case?

The distinguished commentator on the laws of England informs us that upon the foundations of the law of nature and the law of revelation all human laws depend. 1 Bl. Com. 42. The municipal law looks to something more than merely the protection of the lives, the liberty, and the property of the people. Regarding Christianity as

part of the law of the land, it respects and protects its institutions, and assumes likewise to regulate the public morals and decency of the community. The same enlightened author (1 Bl. Com. 124) distinguishes between the absolute and relative duties of individuals as members of society. He shows very clearly that, while human laws cannot be expected to enforce the former, their proper concern is with social and relative duties; municipal law being intended only to regulate the conduct of men, considered under various relations, as members of civil society. Hence he lays it down that, however abandoned in his principles or vicious in his practice a man may be, provided he keeps his wickedness to himself and does not offend against the rules of public decency, he is out of the reach of human laws. But, says the learned writer, if he make his vices public, though they be such as seem principally to affect himself—as drunkenness, or the like—they then become, by the bad example they set, of pernicious effect to society; and therefore it is then the business of human laws to correct them. See, also, 4 Bl. Com. 41, 42.

These principles have been fully recognized by this court. In the case of *Grisham and Ligon v. State*, 2 Yerg. (Tenn.) 589, that thorough common lawyer, the late Judge Whyte, declared that “the common law is the guardian of the morals of the people, and their protection against offenses notoriously against public decency and good morals.” And he adds, in another part of the same opinion: “We have the express authority of the common law, as declared by the judges in the courts of justice, that all offenses against good morals are cognizable and punishable in the temporal courts that are not particularly assigned to the spiritual court.”

The books of reports, both of England and this country, abound with cases where, upon these principles of the common law, convictions have been enforced for various offenses against public morality and decency, without the aid of any statutory enactment. And surely it can be no reason for the relaxation of these salutary principles, but rather the contrary, that in this country we have no “spiritual court,” to lend its aid in the suppression of the numerous offenses falling within the class now under consideration, and that such of them as cannot be reached in the mode pursued in the case before us must “go unwhipped of justice.”

It would be tedious to enumerate the cases in which offenses have been held indictable as *contra bonos mores*. A few will suffice for the present purpose. Public drunkenness, 4 Bl. Com. 41. All indecent exposure of one's person to the public view, *Id.* 65, note 25. In the case of *Rex v. Crunden*, 2 Campb. 89, 1 Russ. on Crimes, 302, it was held an indictable offense to bathe in the sea near inhabited houses, from which the person might be seen, although the houses had been recently erected, and previously thereto it had been used for persons in great numbers to bathe at such place. And it was so held for the reason “that, whatever place becomes the habitation of civilized men, there the laws of decency must be enforced.”

These adjudications, without citing others, we think furnish analogies sufficiently strong to sustain the present prosecution. Are the outrageously vulgar and obscene words found in this record, if uttered in the ear of the public, less likely to shock any one's sense of decency, and to corrupt the morals of society—not to speak of their inevitable tendency to provoke violence and bloodshed—than the offenses charged in the several adjudicated cases above cited? It does not so appear to us. But, were there no analogy to be drawn from any decided case, we hold that, upon the broad principles of the common law which we have stated, this prosecution is most amply sustained. Thus fortified by sound principles—principles which lie at the foundation of every well-regulated community—(and resting on a basis so immutable) we are the more indifferent as to precedents, exactly in point.¹

Let the judgment be affirmed.²

STATE v. WILLIAMS.

(Superior Court of Tennessee, 1808. 2 Over. 108.)

Indictment in the county court for eavesdropping. Appeal to this court, and the only question was whether such a prosecution can be maintained.

It was insisted for the defendant, first, that there was no statute of the state upon the subject; second, that the act which adopted the laws of England confined such adoption to such as are consistent with our mode of living. St. 1715, c. 31, § 5. No precedent can be found of such an indictment, which furnishes a strong inference that such a prosecution was not conformable to the principles of our government, or modes of living.

By the Court (POWELL, J., and OVERTON, J., absent)—CAMPBELL, J. Agreeably to the common law, such an indictment well lies, and nothing can be seen in this part of it which is inconsistent with our situation, or, in fact, the situation of any society whatever.³

¹ Part of the case is omitted.

² Accord: *Barker v. Commonwealth*, 19 Pa. 412 (1852); *State v. Appling*, 25 Mo. 315, 69 Am. Dec. 469 (1857); exhibition of indecent picture, *Commonwealth v. Sharpless*, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632 (1815); indecent exposure of person, *Brittain v. State*, 3 Humph. (Tenn.) 203 (1842); *Commonwealth v. Spratt*, 14 Phila. (Pa.) 365 (1880); cf. *Reg. v. Watson*, 2 Cox, C. C. 376 (1847); night walking, *State v. Dowers*, 45 N. H. 543 (1864); keeping common gaming house, *People v. Jackson*, 3 Denio (N. Y.) 101, 45 Am. Dec. 449 (1846); exhuming body for dissection, *Rex v. Lynn*, 2 T. R. 733 (1788); sodomy, *Commonwealth v. Thomas*, 1 Va. Cas. 307 (1812); keeping or leasing house for immoral purposes, *People v. Erwin*, 4 Denio (N. Y.) 129 (1847); compare *Commonwealth v. Linn*, 158 Pa. 22, 27 Atl. 843, 22 L. R. A. 353 (1893).

³ Accord: Common scold, *James v. Commonwealth*, 12 Serg. & R. (Pa.) 220 (1825); *Commonwealth v. Lovett*, 6 Pa. Law J. 226 (1831); *State v. Pennington*, 3 Head (Tenn.) 299, 75 Am. Dec. 771 (1859).

ANDERSON v. COMMONWEALTH.

(General Court of Virginia, 1826. 5 Rand. 627, 16 Am. Dec. 776.)

The indictment against the plaintiff in error contained two counts, the first of which charged that he, being a married man, on the 22d November, 1825, in the said county of Chesterfield, one Elizabeth F. Hargrove, a maiden and unmarried, and under the age of 21 years, that is to say, of the age of 16 years 2 months 19 days, having no father living, and being then and there under the care and custody of Elizabeth Hargrove, a widow, her mother, did entice, inveigle, take, and carry away from the care and custody of her said mother, for the purpose of prostituting and carnally knowing her, the said Elizabeth F., against the peace and dignity of the commonwealth. The second count in like manner charges him with the enticing, inveigling, taking, and carrying away the said infant over the age of 16 years, and, moreover, charges that he did, on a subsequent day, deflower, carnally know, and prostitute her, the said Elizabeth F. Hargrove, against the peace and dignity of the commonwealth.

DADE, J., delivered the opinion of the court.

The question is whether the offense of which the plaintiff has been convicted, and had judgment, is a misdemeanor, punishable by indictment at the common law.

The class of misdemeanors within which it is insisted this offense is comprehended is that of offenses *contra bonos mores*, over which the Court of King's Bench in England, and the superior courts of law of this commonwealth, have always claimed to have jurisdiction. It is admitted that before the statute of *circumspecte agatis* (St. 13 Edward I), the Court of King's Bench did on this principle punish the offense of incontinency, and that by that statute the jurisdiction was transferred to the ecclesiastical courts. It may be well doubted whether the King's Bench before the statute, or the Courts Christian since, looked beyond the simple fact of incontinence, as that offense is at present contemplated and punished by our own acts of assembly; in other words, whether they looked beyond the mere offense of incontinence, as consisting in the single act of cohabitation between persons of different sexes without the rites of marriage, not varied by any fraud, deception, or inveiglement which may have been practiced by the man. But after the statute of *circumspecte agatis* the Court of King's Bench did not exercise jurisdiction in punishing the mere act of incontinence. It, however, retained its general power of punishing offenses *contra bonos mores*, and it is presumed might have punished an offense of incontinence, combined with circumstances which, beyond the mere criminality of the simple fact, were calculated to make it injurious to society, as in case of incontinence in a street or highway. But in such cases the jurisdiction would not spring from the criminal character of the simple fact, but from its publicity; as there are many

cases where an act, which is not criminal in private, becomes penal by the publicity which attends its perpetration. The act of Sir Charles Sedley in running naked through the streets derived its whole criminality from its publicity. It is not, therefore, in this case allowable to connect the criminality of the mere act of incontinence, which, as such, is punishable in a certain mode prescribed by the statute, with the particular circumstances of fraud and deception, and the special injury to the female, so as to make the supposed common-law offense (as the courts might entertain it in England, since the statute of *circumspecte agatis*) derive support, or even acquire being, from the statutory offense. If the statutory misdemeanor of simple incontinence is to be punished, it must be according to the statute. If there be other circumstances in the case which entitle the common-law courts to jurisdiction, those circumstances must of themselves constitute a misdemeanor. By these principles the only two reported cases in the English books are to be tested. The case of *Rex v. Lord Grey and Others*, 9 State Trials (Cobbet's Ed.) 127, was that of an information alleging a conspiracy to take away and debauch a maiden over the age of 16 and under 21, and an accomplishment of the act by those means. This conspiracy is emphatically charged in the information, and as it was to do a wrongful act, for which, certainly, if done, an action lay to the father of the maid, the conspiracy, if proved, clearly amounted to a common-law misdemeanor. So, in the Case of *Sir Francis Blake Delaval and Others*, 3 Burr. 1432, which was "a motion for an information against the defendants for a conspiracy to put a young girl into the hands of a gentleman of rank and fortune, for the purpose of prostitution," although Lord Mansfield, in allowing the motion, intimates an opinion that the Court of King's Bench might have jurisdiction of the case, as one *contra bonos mores*, yet he decides it on the ground that there was in that case "a conspiracy and confederacy," which, says he, "are clearly and indisputably within the proper jurisdiction of this court." Without doubt, in these cases, the court having jurisdiction of them on undeniable common-law principles, the punishment in case of conviction might well be aggravated by the baseness, perfidy, or malignity, which was the motive and end of the conspiracy. In like manner, as in trespass, circumstances may aggravate the damages, which would not of themselves alone support the action. But clearly neither of these cases does maintain the position that, as a common-law misdemeanor, an indictment or information will lie, either for simple incontinence, or for incontinence produced by means of deception, inveiglement, or enticement; in other words, by seduction.

It is too late now to assume jurisdiction over a new class of cases, under the idea of their being *contra bonos mores*. We must consider the practice of the English courts, from which we derive the principle, as having settled in the course of many centuries the true limits and proper subjects of this principle. If we are to disregard these land-

marks, and take up any case which may arise under this principle as *res integra*, then might it be extended to cases which none has yet thought of as penal. A case of slander may display as much baseness and malignity of purpose, as much falsehood in its perpetration, as ruinous effects in its consequences, and as pernicious an example in its dissemination, as this case of seduction. And yet none would think of prosecuting it criminally. It is true that if something peculiar in our situation had given rise to a class of cases *contra bonos mores*, as in regard to our slaves, which could not have existed in England, we might be justified in applying the rule in the absence of all precedent. But in relation to seduction no such supposition can be made, as we know from the books of Reports that many such cases have occurred there. And we even see that in two cases it was in fact the prominent feature, and yet the jurisdiction in one of them was made to hang on another hinge, and in the other, which was never decided, was certainly fortified by the allegation and proof of a common-law misdemeanor.

From these premises it would seem to be proper to infer that, since the statute of *circumspecte agatis*, in England, the common-law courts have never taken jurisdiction of the mere offense of incontinence, nor of any offense of incontinence combined with other reprehensible circumstances, not in themselves importing a common-law misdemeanor; that in this country the Legislature has taken up the subject of simple fornication and adultery, and has defined a precise mode of proof, and a fixed and certain punishment; that there is no reason to believe that these statutes are cumulative, but that they occupy the whole ground; and that, as in England, the offense, being merely spiritual, is not under any circumstances allowed to be the foundation of a criminal prosecution in the courts of common law; so here, by parity of reasoning, the offense being entirely statutory, it shall not be converted into the foundation of a common-law misdemeanor.

If these premises and deductions be true, we must throw out of this case the statutory criminality of the mere act of incontinence, and then we cannot support the indictment, unless the other circumstances amount to a common-law misdemeanor. If they had made out a case of conspiracy, that desideratum would have been supplied. But it is not found in the artifices and contrivances which may have been used in alluring the female from the path of virtue and the home of her parent.

For these reasons, the court is of opinion that the judgment of the superior court of Chesterfield be reversed, and, this court proceeding to give such judgment as the said superior court ought to have rendered, it is further considered that of the offense of which the said Samuel Anderson hath been indicted, and convicted, he be acquitted and discharged, and that he go thereof without day.¹

¹ Accord: *State v. Brunson*, 2 Bailey (S. C.) 149 (1831); *State v. Cooper*, 16 Vt. 551 (1844). Cf. *State v. Cagle*, 2 Humph. (Tenn.) 414 (1841).

SECTION 9.—EFFECT OF CONSENT, CONDONATION, ETC.

I. CONSENT OF THE PERSON INJURED.

STATE v. BECK.

(Supreme Court of South Carolina, 1833. 1 Hill, 363, 26 Am. Dec. 190.)

Tried before Mr. Justice Richardson, at Pickens, fall term, 1833. Indictment for an assault and battery. The defendants were all acquitted, except William Beck. The facts were these: One of the defendants had lost leather, and, suspecting it was stolen, got Beck and the other defendants to aid him in the search. They found the leather on the premises of Noble Anderson, and immediately took him into custody—whether under warrant or not, did not appear. Whilst in this state, some one, not Beck, asked Anderson if he would not rather be whipped than go to jail. He replied he would, and then requested Beck to whip him. Beck at first hesitated, but finally at the earnest entreaty of Anderson, and saying, "If it will oblige you, I will do it," consented; and, Anderson putting his arms around a tree, he gave him a few stripes with a switch. Anderson was then released, but was afterwards prosecuted, convicted, and punished for stealing the leather. Under these circumstances the presiding judge charged the jury that Beck was clearly guilty, and they found accordingly. He now moves for a new trial, on the ground that the whipping, having been inflicted at the importunity of Anderson and against the inclination of the defendant, was not an assault and battery.

HARPER, J. We do not think the act in question amounts to an assault and battery on the part of defendant Beck. A battery is generally defined to be any injury done to the person of another in a rude, insolent, or revengeful way. There is also another class of cases where some degree of negligence may be imputed; as when a person throwing stones into the highway strikes another passing, or as in the instance of a person throwing a lighted squib into a crowd. But when there is no intention to injure and no negligence, I do not think the offense can be imputed. An instance commonly put is that of a soldier firing his piece at muster, and without any fault of his own injuring another casually and suddenly passing before it. A surgeon, who for his patient's health, cuts off a limb, is not guilty of mayhem; or, if one plucks a drowning man out of a river by the hair of his head, this is no assault. If, according to the prescription of the physician in the Arabian Nights, a physician should beat his patient with a mallet for the bona fide purpose of restoring his health, though this might be malpractice, it would be no battery. Where one gave another a license

Case p. 36

- ~~1st~~ The case goes on two grounds; 1) *in minus*,
2) Consent of the person injured.
① The court says there was no criminal battery + all
because the defendant did not have the *in minus*, 1 *in minus*
+ *in minus* spirit.
② [This is *in minus* with respect to 1)] The ~~defendant's~~ request
that the defendant must be *in minus* *in minus* the *in minus*
The case is *in minus*, because the beating was *in minus* + *in minus*
there was no charge of injury or breach of the peace, *in minus*
+ *in minus* of beating was *in minus* with an *in minus* rod or *in minus*
of a switch.

Cases p. 37.

- Case 1) and Case 2) on this page are *in minus*
The second case is *in minus*; for *in minus* cannot *in minus*
in minus criminal a beating which tends to create a
breach of the peace.
P. 1 *in minus* of foot *in minus*; of *in minus*; re

✓ sent.

to beat him, there is a case in which it is said the license was held void. This may well be. The person receiving the license entertained hostile dispositions toward the other, and, upon being thus licensed, proceeded to carry his revengeful purpose into effect. But in the case before us the defendant had no evil disposition toward Anderson but the contrary; and at his own earnest request, and to save him from what he considered a greater evil, reluctantly consented to inflict the stripes. However ill-judged the act may have been, I cannot think it constituted an assault and battery. The case might be different with respect to the other defendants, who were acquitted; but as to the defendant before us the motion for a new trial must be granted.

JOHNSON and O'NEALL, JJ. concurred.

CHAMPER v. STATE.

(Supreme Court of Ohio, 1863. 14 Ohio St. 437.)

Error to the Court of Common Pleas of Carroll County.

BY THE COURT. Held, an indictment against A. for an assault and battery upon B. is not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them.

An assault and battery and an affray are distinct offenses under the statute, punishable by different penalties.¹

Judgment reversed and cause remanded.

REGINA v. CONEY.

(Queen's Bench Division, 1882. 8 Q. B. Div. 534.)

HAWKINS, J.² At the Berkshire October Quarter Sessions, 1881, the defendants were convicted under the direction of Mr. Benyon, the chairman, upon two counts of an indictment. One charged them with an assault upon Charles Mitchell, the other with an assault upon John Burke; Mitchell and Burke being the combatants in a fight which took place at Ascot, on the 16th of June, 1881. The facts are fully set forth in the case reserved for the opinion of the Court of Criminal Appeal.

Two questions were argued before us: First, whether the combatants were guilty of assaults upon each other; and, secondly, whether the defendants were aiders and abettors in the fight, and therefore also rightly convicted. Upon the first question the defendants' counsel contended that, each of the combatants having assented to the fight,

¹ Accord: *Duncan v. Commonwealth*, 6 Dana (Ky.) 295 (1838).

² Part of the opinion, relating to another point, is omitted, as are also the concurring opinions of Cave, Matthew, Stephen, Manisty, Pollock, and Denman, JJ., and Coleridge, C. J.

neither could be convicted of an assault upon the other. To this contention I cannot give my sanction. As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all. *Christopherson v. Bare*, 11 Q. B. 473; *Reg. v. Guthrie*, L. R. 1 C. C. R. 241, 243, and numerous other cases. It may be that consent can in all cases be given so as to operate as a bar to a civil action, upon the ground that no man can claim damages for an act to which he himself was an assenting party. *Christopherson v. Bare*. That case, however, was decided upon a point of pleading, and must not be considered as a direct authority on this subject. It is not necessary, however, upon the present occasion, to express any decided opinion upon the point; for, whatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace, so as to bar a criminal prosecution. In other words, though a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order. Per Burrough, J., in *Rex v. Belingham*, 2 C. & P. 234. He may compromise his own civil rights, but he cannot compromise the public interests.

Nothing can be clearer to my mind than that every fight, in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize fight for money or other advantage. In each case the object is the same, and in each case some amount of personal injury to one or both of the combatants is a probable consequence, and, although a prize fight may not commence in anger, it is unquestionably calculated to rouse the angry feelings of both before its conclusion. I have no doubt, then, that every such fight is illegal, and the parties to it may be prosecuted for assaults upon each other. Many authorities support this view. In *Rex v. Ward*, 1 East, P. C. 270, the prisoner was tried for the slaughter of a man whom he had killed in a fight to which he had been challenged by the deceased for a public trial of skill in boxing. No unfairness was suggested, and yet it was held that the prisoner was properly convicted. To the same effect is the case of *Reg. v. Lewis*, 1 C. & K. 419, in which Coleridge, J., said: "When two persons go out to strike each other, each is guilty of an assault." See, also, *Reg. v. Hunt*, 1 Cox, C. C. 177, per Alderson, B.; *Reg. v. Brown*, 1 C. & M. 314, by the same learned Baron; and by Bramwell, B., in *Reg. v. Young*, 10 Cox, C. C. 371.

The cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury, or to cause angry passions in either, do not in the least militate against

the view I have expressed; for such encounters are neither breaches of the peace, nor are they calculated to be productive thereof. But if, under color of a friendly encounter, the parties enter upon it with, or in the course of it form, the intention to conquer each other, by violence calculated to produce mischief, regardless whether hurt may be occasioned or not, as, for instance, if two men, pretending to engage in an amicable spar with gloves, really have for their object the intention to beat each other until one of them be exhausted and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault. *Reg. v. Orton*, 39 L. T. 293. Whether an encounter be of the character I have just referred to, or a mere friendly game, having no tendency, if fairly played, to produce any breach of the peace, is always a question for the jury in case of an indictment, or the magistrates in case of summary proceedings.

The cases cited of alleged indecent assaults on young children by their consent are no authorities to the contrary, and may all be disposed of in this one observation, viz., that the indecent impositions of hands charged in those cases as assaults neither involved, nor were calculated to involve, breaches of the peace, and therefore, being by consent, were not punishable as assaults, any more than they would have been had the objects of them been for the most innocent purposes. I think it wholly immaterial in considering cases of this description to inquire by whom the first blow was struck, for, as was said by Lindley, J., in *Reg. v. Knock*, 14 Cox, C. C. 1, "the right of self-defense does not justify counter blows struck with a desire to fight."

Upon the ruling of the chairman as to the illegality of the fight, I entertain, therefore, no manner of doubt, and I am clearly of opinion that the combatants themselves were each guilty of an assault upon each other.²

BARTELL v. STATE.

(Supreme Court of Wisconsin. 106 Wis. 342, 82 N. W. 142.)

Error to review a judgment rendered on a conviction of the plaintiff in error, King Bartell, of the offense of assault and battery. Bartell claimed to be a magnetic healer, in the regular practice of his profession. He treated a young girl, about 18 years of age, the person upon whom the offense was committed, at her request and with the sanction of her father. The girl was ignorant of what was necessary on her part in receiving the massage treatment, which was Bartell's method of operating. She was afflicted with some nervous trouble. Bartell went into a room with her, caused her to remove all of her cloth-

² Accord: *Commonwealth v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328 (1875); *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 801 (1884); *State v. Newland*, 27 Kan. 764 (1882).

The State v. Bartell, King Bartell, of the offense of assault and battery. Bartell claimed to be a magnetic healer, in the regular practice of his profession. He treated a young girl, about 18 years of age, the person upon whom the offense was committed, at her request and with the sanction of her father. The girl was ignorant of what was necessary on her part in receiving the massage treatment, which was Bartell's method of operating. She was afflicted with some nervous trouble. Bartell went into a room with her, caused her to remove all of her cloth-

ing, and then, while her naked body was wholly exposed to his view, he gave her a massage treatment lasting some 15 minutes. The evidence tended to show that after the treatment aforesaid Bartell caused the girl to sit on his lap and that he took some indecent liberties with her.

MARSHALL, J.¹ Some criticism is made of the instructions given to the jury, but we are unable to discover any harmful error in them. The jury were told, in substance, and in language that could not reasonably have been misunderstood, that if Bartell treated his patient in good faith, for the purpose of curing the disease with which she was supposed to be afflicted, and in good faith caused her to expose her body to his view for the purposes of such treatment, his conduct did not constitute the offense of assault and battery; but if, on the other hand, he needlessly caused such patient to expose her person to his view for his evil purposes, and she submitted because of her ignorance, and under those circumstances and for such purpose he secured the opportunity of laying his hands upon her body, he was guilty of the offense of assault and battery. There was no error in the charge so understood.

The judgment of the municipal court is affirmed.²

SPEIDEN v. STATE.

(Court of Appeals of Texas, 1877. 3 Tex. App. 156, 30 Am. Rep. 126)

Burglary.

WHITE, J.³ As disclosed in the record, the facts are substantially as follows:

Pinkerton's Detective Agency, at Chicago, Ill., obtained, by some means, a number of letters and postal cards written by the defendant from Dallas, to a friend in Chicago, urging him to come to Dallas and join him in breaking into and robbing some of the banks in the latter city. It appears that Pinkerton forwarded those letters to John Kerr, a banker of Dallas, who immediately called a meeting of the bankers of the city and submitted the matter to them. The result of this meeting was that the bankers requested Pinkerton to send a detective to Dallas to

¹ Part of this case is omitted.

² Accord: *Rex v. Rosinski*, 1 Moody, 19 (1824). In England, on indictments for the carnal knowledge of female children or for indecent assaults, the consent of the child is held to be a defense. *Reg. v. Martin*, 9 C. & P. 213 (1839). In the United States, generally, a different doctrine prevails. *Singer v. People*, 13 Hun (N. Y.) 418 (1878); *Commonwealth v. Roosnell*, 143 Mass. 22, 8 N. E. 747 (1886); *People v. Stewart*, 85 Cal. 174, 24 Pac. 722 (1890). But mere submission is not consent. *Reg. v. Day*, 9 C. & P. 722 (1841); *Reg. v. Lock*, 2 Cr. Cas. Res. 10 (1872).

When consent is held to be a justification, force in malicious excess of the consent will take away its justifying effect. *Richie v. State*, 58 Ind. 355 (1877).

³ Only so much of the opinion as relates to consent is printed.

This was an indictment for burglary.
 An essential of burglary is breaking and entering &
 here there was no breaking etc, because the door was opened
 by the owners agents and with his consent

This raises the same question as the preceding
 It is a question of fact each time whether the consent
 or acquiescence of a third party takes away an essential element
 of a crime, and if his consent makes a crime not punishable;
 but he can by consenting to part with his property or to
 entering of his house negate an essential element
 Case p. 43 seems wrong. It is not like the case where the
 owner, knowing of it, does nothing or does not give his consent.

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work up the case. Deroso, a sergeant of Pinkerton's force, came, and, after an interview with the bankers, sent back to Chicago for Wood and McGuire, two detective aids who were to represent themselves to the defendant as professional burglars and induce him to enter some bank building in the nighttime, when they would procure his arrest.

After the arrival of Wood and McGuire they set to work to carry out this plan, keeping in constant communication with Deroso, and, through him, with the bankers, who were kept constantly informed as to the plans and movements of the parties. Finally it was agreed on all hands that the banking house of Adams & Leonard should be broken into on Sunday night. Adams & Leonard agreed to the arrangement, and the detectives were, in the adventure, working in their employ.

Pursuant to the plan agreed upon, Deroso, Hereford, a deputy sheriff of Dallas county, a Mr. Mixon, United States deputy marshal, and another party entered and took possession of the bank during the daytime, about 2 or 3 o'clock on Sunday, to remain therein until the burglary was effected and the defendant was arrested. About 1 o'clock at night the back door of the bank was forced open by the two detectives, Wood and McGuire, who came in, spoke to the concealed parties, and went into the vault, when, after remaining about an hour, Wood went out, told Speiden, the defendant, that they wanted more help, and returned in a short time, and, coming in, closed the door after him. In a minute or two Speiden came in and closed the door, when the officers arrested him.

Now, as to the law of the case: To our minds it is clear that Deroso and the other detectives were the servants and agents of Adams & Leonard, and had full authority to consent to defendant's entry into the bank, and that his entry was not only with their consent, but at their solicitation. The case is somewhat like that of a man being robbed by his own consent, although the supposed robbers did not know of the consent. Reanes' Case, 2 East, 734; McDaniel's Case, Fost. 121.

In Tennessee, where the prisoner had arranged with a negro, during the days of slavery, to steal him, and the negro informed his master, who told him to carry out the agreement between the prisoner and himself, which was done, and the prisoner was arrested in the act, it was held that, to constitute larceny of a slave, it must appear that the accused had possession of the slave, and that the possession was obtained without the consent of the owner. Kemp v. State, 11 Humph. (Tenn.) 320.

Mr. Bishop says: The cases of greatest difficulty are those in which one, suspecting crime in another, lays a plan to entrap him. Consequently, even if there is a consent, it is not within the knowledge of him who does the act. Here we see * * * that, supposing the consent really to exist, and the case to be one in which, on general doctrines, the consent will take away the criminal quality of the act, there is no legal crime committed, though the doer of the act did not

know of the existence of the circumstances which prevented the criminal quality from attaching. * * * A common case is that of burglars who, intending to break into a house and steal, tempt the servant of the occupant to assist them, and the servant, after communicating the facts to his master, is authorized to join them in appearance. Under such circumstances, clearly, the burglars are not excused for what they do personally; but it seems, if the servant opens the door while they enter, they are not held criminal for this breaking thus done by the servant, acting under command of the occupant of the house broken." 1 Bishop's Cr. Law, § 262. See, also, section 263.

The case of *Regina v. Johnson and Jones*, 1 Car. & M. (41 Eng. C. L. R.) 123, is in point. In that case the court say: "Cole, the groom, it is true, appeared to concur with the prisoners in the commission of the offense. But in fact he did not really concur with them, and he, acting under the direction of the police, must be taken to have been acting under the direction of Mr. Drake the prosecutor. Under the circumstances of this case the prisoners went into a door which, it seems to me, was lawfully open. Therefore neither of them was guilty of burglary."

In *Eggington's Case*, which is also in point, it was held "that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and the acts of Phillips (the servant) were his acts." 2 East, 666.

Another case in point is *Allen v. State*, the substance of which is that, "when the proof showed that the prisoner proposed to a servant a plan for robbing his employer's office at night; that the servant disclosed the plan to his employer, by whom it was communicated to the police; that the master, acting under the instructions of the police, furnished the servant with the keys of his office on the appointed night; that the servant and the prisoner went together to the office, when the servant opened the door with the key, and both entered through the door, and were arrested in the house by the police—held that there could be no conviction of burglary." 40 Ala. 334, 91 Am. Dec. 477. See, also, 2 Whart. Cr. Law, § 1540; Roscoe's Cr. Ev. 345.

In the case at bar the detectives cannot be considered in any other light than as the servants and agents of the bankers, Adams & Leonard. They (the detectives) had the legal occupancy and control of the bank. Two of them made arrangements with defendant to enter it; and defendant, when arrested, had entered the bank at the solicitation of those detectives, who were rightfully in possession, with the consent of the owners. This cannot be burglary in contemplation of law, however much the defendant was guilty in purpose and intent.

The judgment of the lower court must be reversed, and the cause remanded.

Reversed and remanded.²

² Accord: *Love v. People*, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139 (1896); *State v. Waghalter*, 177 Mo. 676, 76 S. W. 1028 (1903).

STATE v. CURRIE.

(Supreme Court of North Dakota, 1905. 13 N. D. 655, 102 N. W. 875, 69 L. R. A. 405, 112 Am. St. Rep. 687.)

MORGAN, C. J., delivered the opinion of the court.¹

The defendant was convicted of the crime of burglary in the third degree, and sentenced to five years in the penitentiary. His principal contention on the appeal is that the court erred in refusing to give certain requested instructions bearing on the relation of the owner of the building and of a certain detective to the commission of the alleged crime. His claim is that the owner of the building consented to the burglary, and that defendant was instigated to commit the burglary under the undue influence of the detective in causing him to become intoxicated.

The facts are uncontradicted in respect to what transpired before the burglary, and are as follows: About January, 1904, several crimes, including burglaries, larcenies, and arson, were committed in Minto, Walsh county, N. D., without any success by the local authorities in arresting the perpetrators and bringing them to trial. Thereupon the county authorities sought the aid of one Walker, a detective from St. Paul. The detective had an interview with the state's attorney upon his arrival in the county, and secured from him the names of the persons suspected of complicity in the past crimes, among them being the name of the defendant. The detective thereupon acted as a cook in a restaurant in Minto. This restaurant was kept in connection with a place kept by one Gile, where intoxicating liquors were unlawfully sold. The restaurant feature of the establishment was a pretense, as a matter of fact, and was resorted to for the purpose of giving to the detective the appearance of having employment at the place. After some days the defendant and Walker became acquainted, and soon became constant companions. They ate together, slept together, drank to excess together, and became confidential with each other and intimate in their relations. The detective loaned the defendant small sums of money at one time, and in conversation about money matters the detective told defendant that he had \$65 coming from Canada. The defendant then stated to Walker that he knew where "we could get some money," and, upon being asked where, answered, "In some of these stores around here." The defendant and Walker finally, and after much consideration of the time and place of a burglary, concluded to break into a store. The detective says, in respect to the final conclusion: "We arranged a deal to break this store open." The first suggestion of a burglary, as between the defendant and Walker, came from the defendant. Several stores were suggested by the defendant as ones that might be burglarized, and among them Zulesdorff's, the one that was broken

¹ Part of this case is omitted.

into. Before the store to be burglarized was agreed upon, Walker secured a letter of introduction to the mayor of Minto from the state's attorney. Walker presented the letter to the mayor, and told him of the contemplated burglary, and further stated: "I told him what I was there for, and told him about the stores, this building to be broken open, and told him that I didn't want myself in some place where I might get shot, * * * and told the doctor, if he knew any storekeeper in town there that would keep a secret, he had better go and notify him, and afterwards I would see him." Dr. Evans, the mayor, suggested that Zulesdorff's store be selected, and saw Zulesdorff in pursuance of this request, and Zulesdorff sent Walker word that he wished to see him. Walker saw Zulesdorff thereafter, and testifies as to what transpired between them as follows: "And he said that he had seen Dr. Evans, and he said that things would be all right; and I told him that after it was broken into he was to keep still about it, and told him what I wanted to know on the outside; and I said, 'By doing that I can get in a little work, and can find out the rest of these people.' So that was about all that was said between I and Frank Zulesdorff."

Later, he testified as follows upon his further cross-examination: "Q. And Zulesdorff told you it would be all right? A. Yes, sir. Q. And that he would permit you to use his store in your plans, and would keep the matter a secret for sufficient length of time to enable you to complete the job? A. Yes, sir."

Zulesdorff did nothing further in reference to the burglary, except that he marked two \$5 bills that he left in the money drawer with other money on the Saturday night preceding the burglary, which was committed on Sunday night. The doors and safe and money drawers were locked, and left in the same manner as usual. He marked the bills, so that he could identify them in case they were stolen. On these facts it is claimed that Zulesdorff consented to the breaking, and that the defendant cannot, in consequence of such consent, be rightfully convicted of the crime of burglary.

After the conversation between Zulesdorff and Dr. Evans and Walker, it was definitely decided by defendant and Walker that the Zulesdorff store was the one to be burglarized. Walker said that he never made any suggestions to the defendant as to the burglary; that he simply acquiesced and agreed to defendant's plans. In answer to a question as to "why you didn't go on with your plans then, everything being all right," he testifies: "Yes, sir; right enough, if I had wanted to work the plan myself, but I didn't want to do that. I wanted him to do it himself, if he wanted to do it." Walker and defendant agreed to break into the store Saturday night, and went to the store for that purpose, but something happened after they got to the store causing the breaking to be abandoned on defendant's request. He then said, however, "We will try it to-morrow night." On Sunday night they again went to the store, and broke into it by

joint force. The defendant removed the marked bills and other money from the money drawer, and a fur-lined coat was also taken from the store by defendant, and they left the building together. After leaving the building the money, \$16.60, was equally divided between them. The overcoat was hidden in a livery barn by the defendant, and subsequently found by an officer and returned to the owner. In a few days the defendant was arrested at the instance of one Gile, and his trial and conviction followed.

Upon these facts two questions are presented for consideration, which were raised at the trial by requests to instruct the jury, and they were also urged on a motion for a new trial: (1) Did the owner of the property consent to the breaking into of his building by the defendant? (2) Did the fact of the detective Walker's participation in the burglary entitle the defendant to a reversal of the judgment of conviction?

Upon the first question the facts as narrated show that Zulesdorff did nothing by any act to aid in the burglary of his building. He remained passive after being informed of the intended burglary. The plan of a burglary had been arranged before he was advised of the plan of the detective to join the defendant in the proposed burglary as a feigned participant. Zulesdorff gave the detective no instructions. He did not advise him as to the manner of proceeding, nor do anything to assist in the burglary. The store was closed and locked in the usual manner. When he consented to remain away, at the request of the detective, for the purpose of securing evidence, it was not certain that his store was the one to be burglarized, nor when it was to occur. The Zulesdorff store was selected as the one to be burglarized after the detective's interview with him. Under these conditions it cannot be said that he consented to the burglary. Before the owner's consent will be a defense to a burglary, the owner must participate, or in some way aid or solicit or encourage the burglary. Mere knowledge that a person's property is to be burglarized, followed by non-action on his part to thwart it, is not deemed a consent to it. His consent must be manifested by some act of assistance. Mere passiveness for the purpose of securing evidence of the burglary is not such consent as can be urged by the burglar as a defense. The detective was not the agent of Zulesdorff in the matter at all, nor did he have charge of the building in any sense; hence the detective's acts cannot be said to be those of the owner.

Upon the second question the state's evidence shows that the detective did not instigate the commission of the offense. The suggestion of committing the crime, and the active planning of it, is shown to have come from the defendant. The detective fell in and agreed with the defendant's plan. It is true the detective deceived the defendant as to the purpose of his complicity in the crime. He assisted by his acts, but with a hidden purpose. Without commending this

practice, or commenting upon it as dangerous and generally of doubtful propriety, we will say that, if the defendant is shown to have committed the crime in its completeness, the feigned complicity of a detective in the crime should not be a shield to the defendant. The authorities almost unanimously hold that a detective may aid in the commission of the offense in conjunction with a criminal, and that the fact will not exonerate the guilty party. Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense. The defendant must act freely of his own motion, and, if he so acts, the fact that the detective was not an accomplice in fact will not accrue to his benefit. The defendant is not to be charged with what was done by the detective, as the two are not acting together for a common purpose. As was said by the court in *State v. Jansen*, 22 Kan. 498: "The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of community of motive. * * * But where each of the overt acts going to make up the crime charged is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts be done by the party who is with and apparently assisting him." The cases cited above are all to the effect that the assistance of a detective in a burglary is no defense to a person who himself does every act essential to constitute the burglary.

The judgment is affirmed.²

II. CONSENT OF THE STATE.

If two play at barriers, or run a tilt without the King's commandment, and one kill the other, it is manslaughter; but if by the King's command, it is not a felony, or, at most per infortuniam. 11 Hen. VII, 23; B. Coron. 229; Dalton, c. 96; Co. P. C. p. 56.

Hale, P. C. 473.

FORD v. CITY OF DENVER.

(Court of Appeals of Colorado, 1898. 10 Colo. App. 500, 51 Pac. 1015.)

THOMSON, P. J., delivered the opinion of the court.

Suit by the city of Denver to recover a penalty for an alleged violation of its ordinance. Judgment for the plaintiff, and appeal by the defendant.

² See, also, *State v. Abley*, 109 Iowa, 61, 80 N. W. 225, 46 L. R. A. 862, 77 Am. St. Rep. 520 (1899); *State v. West*, 157 Mo. 309, 57 S. W. 1071 (1900); *Dalton v. State*, 113 Ga. 1037, 39 S. E. 468 (1901).

Consent of the State

The Consent of the Body which makes the law to an infraction of its law is a defense.

So the two cases on p. 46 are cases where the ~~two~~ sources of the law, the King and the City authorities, promissed the alleged offender

II. But Government officials have no power to make crime unpunished or to change the law.

So, for example, if a P.D. inspector actually ordered to send a man to prison; or that a Mayor could in any way stop such a case, ~~both~~ that official by his ignorance can take away a vital element of the crime.
ex: I was indicted for assisting persons of color to escape. I was, indeed, and had had permission of police to go as far as I did. Did not quibble, being to prevent of police regulations an element of the crime.

III. The mere ~~xxx~~ knowledge or ignorance by the public officials is no defense.

Query, should the knowledge or consent of a local officer be a defense, except where it involves an essential ingredient. But the case p 46 says, because there is no true showing that the City acts in violation of law, is distinguished from lower officers, ~~unsubstantiated~~ E.)

The case on p 47 created an inference between consent and a right of offering an opportunity. But this was not sound. It is of no proper reason.

The ordinance, the violation of which was charged, prohibited the selling or giving away, within the limits of the city, of intoxicating or malt liquors, in any quantity less than a gallon, by any person without a license for the purpose, except by a druggist upon the prescription of a reputable physician and for medical purposes. The case was heard upon an agreed statement of facts, from which it appears that the defendant was a druggist, not having a license, and that a sale of a quantity of intoxicating liquors less than a gallon was made by his clerk without the prescription of a physician, but on the supposition that it was to be used for medical purposes.¹

Second. It appears that the city was instrumental in procuring the sale of the liquor. Its purpose was to lay the foundation for a suit in which a judicial opinion as to what would constitute a violation of the ordinance might be procured. Apparently this purpose was unknown to the defendant's clerk when he made the sale, and, technically at least, his act was contrary to the ordinance. But the city is in no position to say that its ordinance was violated. It was as much responsible for the sale of the liquor as the defendant, and it will not be permitted to replenish its treasury from penalties incurred at its instigation. It cannot be heard to complain of an act the doing of which it solicited. It is entitled in a proper case to have its ordinance construed, and questions concerning it determined; but it cannot manufacture a case for the purpose, or obtain the information it desires at the expense of a party for whose infraction of its ordinance it is responsible. For the foregoing reasons the questions submitted will not be discussed.

The judgment is reversed, and the court below instructed to dismiss the case.

Reversed.

CITY OF EVANSTON v. MYERS.

(Supreme Court of Illinois, 1898. 172 Ill. 266, 50 N. E. 204.)

Mr. Justice WILKIN delivered the opinion of the court.²

The Appellate Court, in passing upon this case, found that the beer was sold as alleged in the complaint, but held that, inasmuch as the city furnished the money and the purchaser was in its employ to discover violators of the ordinance, the offense was one induced by the city of Evanston, and the defendant was not punishable therefor. Under the facts of the case, as we understand them, we cannot concur in this view. The offense, if one was committed, consists in

¹ Part of the opinion is omitted.

² The opinion only is printed.

the unlawful selling of intoxicating liquor. The defendant was passing through an alley in Evanston with a load of beer when Denvir hailed him, asking, "How is it for a case of beer?" to which he replied, "It is all right." The money was paid, and the beer handed out. It is clear that Denvir, in making this purchase, used no fraud, deceit, or inducement other than a willingness to buy. It also appears, uncontradicted, that appellee had sold beer to Denvir at other times, in violation of the ordinance in question. On this occasion he was willing to do so again. The offense of selling the beer having been voluntarily committed, is it reasonable to say that the willingness of Denvir to purchase, for whatever purpose or object, constitutes a sufficient inducement to appellee to make the sale, so as to excuse the act? We think not. The offense consisted, not in the buying, but in the selling, of the beer.

A number of cases are cited to sustain the theory of the appellee's defense, but in those cases the criminal acts charged were not wholly voluntary on the part of the defendant, but were induced, in some measure, by the acts and conduct of the prosecuting witnesses. The principle here involved is well announced in the case of *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550. In that case a post office inspector suspected Grimm of being engaged in the business of selling obscene pictures and sending them through the mails. Under assumed names the inspector wrote for a supply of the pictures, and received them from defendant. In defense of the charge made against him, defendant insisted the conviction should not be sustained, because the letters were deposited in the mails at the instance of the government and through the solicitation of one of its officers. Upon this point the court said: "It does not appear that it was the purpose of the post office inspector to induce or solicit the commission of a crime, but it was to ascertain if the defendant was in an unlawful business. * * * The law was actually violated by the defendant. He placed letters in the post office which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt." See the cases there cited.

In the case at bar it may be truly said it does not appear that it was the purpose of the city of Evanston to induce or solicit the unlawful selling of beer within its limits, but to ascertain whether the ordinance was being violated in that regard. The appellee committed the act charged against him, deliberately and voluntarily, and in such a manner as to indicate that he would have sold beer to any other person applying for it. We think no element is wanting on the part of appellee in this case to bring this act within the letter and spirit

of the ordinance. The position of appellee is not that he is innocent of the offense charged, but that his guilt was proven on the trial by evidence obtained in an objectionable manner by the city. This is a matter of which he has no right to complain.

Other points insisted upon by counsel for appellee have been duly considered, but we find no substantial merit in them.

The judgments of the criminal court and Appellate Court will be reversed, and the case will be remanded to the criminal court.

Reversed and remanded.²

III. NEGLIGENCE OF THE PERSON INJURED.

REGINA v. LONGBOTTOM.

(Norfolk Circuit, 1849. 3 Cox, C. C. 439.)

The indictment charged that the two prisoners feloniously killed and slew John Truman, by driving over him with a gig.

O'Malley and E. Rodwell, for the prosecution, proved that the two prisoners, who lived in Ipswich, had gone to Bentley on the day named in the indictment in a gig, and that on their return at night they were observed to be in a state of partial intoxication. At several places they drove along the high road at a very rapid pace, and when they got within two miles of Ipswich they met three men. At that time they were laughing and driving rapidly down a hill, the top of which was thickly shaded with trees. When the three men got to the trees they found a man lying insensible in the middle of the road, presenting all the appearance of having been just run over by some vehicle. They took up the man, who shortly afterwards died. On inquiry it turned out that the deceased was a man who had been deaf from childhood, but had, in spite of his infirmity, contracted an inveterate habit of walking at all hours in the middle of the road. Against the probable consequences of an indulgence in this habit he had been frequently warned, but without effect.

² Compare *U. S. v. Adams* (D. C.) 59 Fed. 674 (1894); *Armstrong v. State* (Tex. Cr. App.) 47 S. W. 981 (1898); *Wilcox v. People*, 17 Colo. App. 109, 67 Pac. 343 (1902); *State v. Lucas*, 94 Mo. App. 117, 67 S. W. 971 (1902).

"It is not pretended that there was a law of our state authorizing the killing of a male of that tribe, and the proclamation or order of any officer of the state could not make that right which is wrong, or legal which is illegal. If such a proclamation or order was made, and if on account thereof any ignorant person was misled into the commission of crime, it is for the Governor to determine whether that would be a proper case for the exercise of executive clemency." *Wilson, C. J., in State v. Gut*, 13 Minn. 341 (Gil. 315) (1868). See, also, *People v. Mills*, 18 N. Y. Cr. R. 125, 86 N. Y. Supp. 529 (1904).

D. D. Keane, for the prisoner, Longbottom, submitted, at the close of the case for the prosecution, that he ought to be acquitted, inasmuch as it appeared that the deceased had contributed in a great measure, if not altogether, to his own death by his own obstinacy and negligence. There was, moreover, no proof that the prisoners were driving at any extraordinary pace; while it appeared that they were in the middle of the road, and that the deceased was walking just where he ought not to have been, reference being had to the lateness of the hour, the darkness of the place, and his peculiar infirmity, which ought to have induced him to refrain from the selection of the most frequented part of the high road as that on which alone he would walk. No accident could possibly have occurred to the deceased, if he had been at the side of the road where foot passengers always walked. He had, therefore, contributed to his own death, and the question was whether that fact did not exonerate the prisoners from such a charge as the present. This might be tested by analogy with a civil action under Lord Campbell's act. Under that statute the representatives of the deceased could not maintain an action for compensation against the prisoners, as he had himself been guilty of negligence; so, in this prosecution, it was contended that the prisoners could not be convicted of the crime of manslaughter.

ROLFE, B. I cannot stop the case; for, whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion that, if any one should drive so rapidly along a great thoroughfare leading to a large town as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which amounts to an illegal act in the eye of the law; and, if death ensues from the injuries then inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased. I do not at all recognize the analogy which has been put with regard to an action under Lord Campbell's act and a charge of felony; and I abstain from giving any opinion as to the question whether, under the circumstances here proved, the representatives of the deceased would be precluded from maintaining an action for compensation against the prisoners. But there is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, amounting to illegality, and there is no balance of blame in charges of felony; but, wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished. If the jury should be of opinion that the

prisoners were driving along the road at too rapid a pace, considering the time and place, and were conducting themselves in a careless and negligent way in the management of the horse intrusted to their care, I am of opinion that such conduct amounts to illegality, and that the prisoners must be found guilty on this indictment, whatever may have been the negligence of the deceased himself.

Verdict, guilty.¹

IV. GUILT OF THE PERSON INJURED,

PEOPLE v. MARTIN.

(Supreme Court of California, 1894. 102 Cal. 558, 36 Pac. 952.)

GAROUTTE, J.² The appellant was convicted of obtaining money and other personal property from one Sarah E. Leonard by false and fraudulent pretenses. The information is laid under section 532 of the Penal Code, and the false pretenses upon which it is based consisted in the representations to said Leonard by the defendant that a judgment in a large sum of money had been obtained against her in the state of New York, and that her property would be seized and sold to satisfy such judgment. The information further states that said Leonard believed such statements, and, so believing, and in order to avoid the application of her property to the satisfaction of such judgment, she was induced to, and did, transfer and deliver said property to defendant.

The information contained various allegations other than those just noticed, and a demurrer was offered thereto upon various grounds; but we think the information well drawn, and our consideration of the alleged defects therein will be limited to the contention of appellant that the allegations we have in substance quoted therefrom constitute a bar to the prosecution of the accused. Possibly the state might be barred from conducting a criminal prosecution by reasons

¹ Accord: *Rex v. Hutchinson*, 9 Cox, C. C. 555 (1864); *Reg. v. Kew*, 12 Cox, C. C. 355 (1872). See, also, *Commonwealth v. Corporation*, 134 Mass. 211 (1883). Contra: *Reg. v. Birchall*, 4 F. & F. 1087 (1866).

"In *Reg. v. Desvignes*, tried before Denman, J., at the last session of the Central Criminal Court, the defendant was charged with the manslaughter of Sarah Ballard, on the night of the 24th of July last, by so negligently managing a steam launch that a skiff containing the deceased and other persons was run down and capsized, and her death caused by drowning. In opening the case, the counsel for the prosecution laid it down broadly that, although contributory negligence would be an element in favor of the defendant in a civil case, it was no answer to a charge of manslaughter. Mr. Justice Denman said: 'There is one decision to the contrary (*Reg. v. Birchall*, 4 F. & F. 1087); but I grant that current authority is in the direction you mention. The point, however, has never been settled in the Court of Appeal.'" 70 L. T. (O. S.) 76 (1880).

² Arguments of counsel and part of the opinion relating to another point are omitted.

of the acts of its duly constituted officers representing the state in such matters; but it is a novel proposition that the acts and conduct of a private individual, even though such individual be what is termed in law the prosecuting witness, could, under any imaginable circumstances, bar the state from the prosecution of a criminal. Appellant states her position as follows:

"If, at the time that Sarah E. Leonard placed her property in the possession of the defendant, she believed that there was a valid and existing judgment for \$17,000 or \$18,000 against her in the state of New York, and she placed her property out of her hands to avoid its being applied towards the satisfaction of such judgment, her intentions were dishonest, and she was herself guilty of a criminal offense, and became *particeps criminis*."

The case of *McCord v. People*, 46 N. Y. 472, appears to support the doctrine insisted upon by appellant, but the great weight of authority is to the contrary. It is said by the court in *Commonwealth v. Morrill*, 8 Cush. (Mass.) 571: "Supposing that to be otherwise, and it should appear that Lynch (the party defrauded) had also violated the statute, that would not justify the defendants. If the other party has also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally." The doctrine of the foregoing case is approved by Mr. Bishop in his work on Criminal Law (section 469, 8th Ed.). The principle is also declared in the same work at sections 256 and 257. See, also, *In re Cummins*, 16 Colo. 451, 27 Pac. 887, 13 L. R. A. 752, 25 Am. St. Rep. 291. From any aspect of the case the contention has no sound support. If the party defrauded is also guilty of a violation of the law, he, too, should be prosecuted, rather than his offense should serve as a shield to the other's crime. The offense is committed against the public, and not against the individual. The guilty party is prosecuted in the interest of the people of the state, and not in the interest of the party defrauded of his property. There is no principle of law that will bar the state from prosecuting a criminal because some other person is a *particeps criminis*. But, viewing the facts of this case in the light of the indictment, the defrauded party committed no offense whatever. How could she possibly do so, when the pretenses were all false, and the whole thing was but a scheme of lying and deceit? If such be a crime, she transferred no property to evade its application upon a money judgment which stood against her, for there was no such judgment. Her intention to make a transfer for that purpose avails nothing, for a person's intentions alone violate no law.

We have examined the additional assignments of error based upon the rulings of the court as to the admission and rejection of evidence, and hold none of them to be well taken.

For the foregoing reasons, it is ordered that the judgment and order be affirmed.

HARRISON, McFARLAND, DE HAVEN, and VAN FLEET, JJ., concurred.

Rehearing denied.²

V. CONDONATION OF THE PERSON INJURED.

ROBERT'S CASE.

(Select Pleas of the Crown, Sel. Soc. Pl. 77. Cornish Eyre, 1201.)

Malcot Craue appeals Robert, Godfrey's son, of rape. He comes and defends. It is testified that he thus raped her and that she was seen bleeding. By leave of the justices they made concord on the terms of his espousing her.

WILLIAMS v. STATE.

(Supreme Court of Georgia, 1898. 105 Ga. 606, 31 S. E. 546.)

LUMPKIN, P. J. An indictment against G. W. M. Williams, found by the grand jury of Screven county and transferred for trial to the county court thereof, charged that the accused "did falsely and fraudulently represent to J. C. White that he, the said Williams, had purchased the Cuyler & Woodburn Railroad for the sum of \$27,000, and that he had raised all of the purchase price except \$100, and was then on his way to Savannah to pay the purchase money. By these false and fraudulent representations the said G. W. M. Williams fraudulently induced the said J. C. White to lend him, the said G. W. M. Williams, the sum of \$100, which he promised to pay back within three days from the date of the loan. These representations, made as aforesaid, were all false and fraudulent, and were made by the said Williams for the purpose of defrauding the said White, and did in point of fact defraud the said White, contrary to the laws of the said state, the good order, peace, and dignity thereof." At the trial the state introduced testimony substantiating all the material allegations of the indictment. It distinctly appeared that, in the conversation between the accused and White which resulted in the former's procuring the loan, he claimed to be the owner of the railroad in question. For instance, he used the expression, "I don't want to incur my road," and other language indicating a purpose on his

² Accord: *Cunningham v. State*, 61 N. J. Law, 67, 38 Atl. 847 (1897). See, also, *Commonwealth v. Henry*, 22 Pa. 253 (1853); *Reg. v. Hudson*, 8 Cox, C. C. 305 (1860); *Commonwealth v. Shober*, 3 Pa. Sup. Ct. 554 (1897); *Gilmore v. People*, 87 Ill. App. 128 (1899). Contra: *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719 (1876).

part to create the impression that the railroad was his property. It was further shown by the state that White was actually defrauded of \$100, and that Williams did not repay the loan as he had agreed to do. Evidence in behalf of the accused tended to show the following: After Williams had been arrested upon a warrant charging him with being a cheat and swindler, and before he was indicted, he made a settlement with White by delivering to him the promissory note of E. E. Wood & Co. for \$100, which White accepted in full satisfaction of his demand against Williams, and afterwards sold for \$90. There was a verdict of guilty in the county court, and by his petition for certiorari Williams alleged error as follows:

Second.¹ The judge erroneously charged that "a settlement of the debt by White after the warrant had been sworn out, and the defendant was under arrest or under bond, would be no bar to the prosecution."

We are also of the opinion that the second charge excepted to was free from error. That a fraud was perpetrated upon White plainly appeared. As a result of this fraud he was deprived of the possession and use of his money, and it is apparent from the evidence as a whole that there was a criminal intent on the part of Williams not to return the money at all. That he was subsequently forced to make restitution, which, as will have been seen, was only partial, did not relieve him of the consequences of his violation of the criminal statute, which was complete before his arrest. As well might it be said that one guilty of a larceny could escape prosecution by returning the stolen goods after being arrested for the offense.

Judgment affirmed. All the Justices concurring.²

COMMONWEALTH v. CARR.

(Superior Court of Pennsylvania, 1905. 28 Pa. Super. Ct. 122.)

Indictment for defrauding by false pretenses. The opinion of the Superior Court states the case. Verdict of guilty, upon which judgment of sentence was passed.

SMITH, J. The crime of defrauding by false pretenses belongs to the class of misdemeanors which, by section 9 of the act of penal procedure of March 31, 1860 (P. L. 432), may be settled between the complainant and the offender, at the discretion of the examining mag-

¹ Only so much of the opinion as relates to condonation is printed.

² Accord: Rape, *Commonwealth v. Slattery*, 147 Mass. 423, 18 N. E. 399 (1888); forgery, *State v. Tull*, 119 Mo. 421, 24 S. W. 1010 (1894); seduction, *Barker v. Commonwealth*, 90 Va. 820, 20 S. E. 776 (1894); false pretense, *Commonwealth v. Brown*, 167 Mass. 144, 45 N. E. 1 (1896); embezzlement, *Dean v. State*, 147 Ind. 215, 46 N. E. 528 (1897). See, also, *State v. Frisch*, 45 La. Ann. 1283, 14 South. 132 (1893); *May v. State*, 115 Ala. 14, 22 South. 611 (1896); *Woodbridge v. State*, 49 Fla. 137, 38 South. 3 (1905).

istrate or the court. *Rothermal v. Hughes*, 134 Pa. 510, 19 Atl. 677; *Geier v. Shade*, 109 Pa. 180. It is essential to such settlement, however, that the complainant shall "acknowledge to have received satisfaction for such injury and damage." Until this is done, there is no settlement; and neither partial restitution by the defendant, nor an agreement falling short of an acknowledgment of satisfaction in the manner provided by the act, bars a prosecution for the criminal offense.

The ruling assigned for error in this case is the refusal to admit in evidence seven checks given by the defendant to the prosecutor, for amounts aggregating \$3,100, and duly honored, in partial payment of a note for \$9,000 given by the defendant for repayment of the amount obtained by him from the prosecutor, as charged in the indictment, with the prosecutor's receipt for a check subsequently given for the residue, but which remained unpaid.

The papers thus offered in evidence formed no part of the transaction from which the prosecution arose, and there was nothing in that transaction which they could explain. Since both the prosecutor and the defendant had already testified to the payment made by these checks, there was no question respecting them requiring further evidence. At best, the checks were only cumulative evidence of matters of fact not in dispute, and, as the case is presented in the bill of exceptions, neither their admission nor rejection could affect the defense. Moreover, in view of the evidence for the commonwealth, the partial restitution by the defendant, shown by these checks, was immaterial. Under the act referred to, the defendant can be relieved from prosecution only by the complainant's acknowledgment of satisfaction, with the approval of the magistrate or the court. As to the note and check given by the defendant, in the absence of a stipulation that they should be taken as payment, they were not satisfaction unless paid; and nearly two-thirds of the amount for which they were given remained unpaid at the commencement of the prosecution. Thus the complainant had neither acknowledged nor received satisfaction, and his efforts to obtain it were no bar to the conviction of the defendant on the indictment.

Judgment affirmed.

By statute in some states certain offenses may be compromised, in some cases with, and in others without, the consent of the court or committing magistrate. See *Statham v. State*, 41 Ga. 507 (1871); *McDaniel v. State*, 27 Ga. 197 (1859); *Saxon v. Conger*, 6 Or. 388 (1877); *Rohrheimer v. Winters*, 126 Pa. 253, 17 Atl. 606 (1889). The New York Code of Criminal Procedure provides (section 663): "When a defendant is brought before a magistrate, or is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the crime has a remedy by civil action, the crime may be compromised, as provided in the next section, except when it was committed: (1) By or upon an officer of justice while in the execution of the duties of his office; (2) riotously; or (3) with an intent to commit a felony."

VI. CONDONATION OF THE STATE.

If any felons will confess their crimes and accuse others and become approvers, let them be put out of penance, and let their confessions be presently received and enrolled by the coroner, and from that day forward let them have of the sheriffs three half pence a day for their support.—Britton, 12.

COMMONWEALTH v. ST. JOHN.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 566, 54 N. E. 254, 73 Am. St. Rep. 321.)

MORTON, J.¹ The decisive question in each case is the same, and the cases may therefore properly be considered together. The question is whether the immunity that was promised to the defendants by the city marshal and by Boyle, the chief detective of the police department of Springfield, can be pleaded in bar of the indictment against them. We think that it cannot. The immunity and protection which may be promised from the consequences of crime on condition of a full disclosure and readiness to testify are not a matter of right, but rest in the last resort on the sound judicial discretion of the court having final jurisdiction to sentence, and cannot, therefore, be pleaded in bar. *Wight v. Rindskopf*, 43 Wis. 344; *State v. Moody*, 69 N. C. 529; *State v. Graham*, 41 N. J. Law, 15, 32 Am. Rep. 174; *Rex v. Rudd*, Cowp. 331; *Whart. Crim. Ev.* §§ 439, 443; 3 Russ. Crimes (9th Am. Ed.) 599.

When such promises are made by the public prosecutor or with his authority, the court will see that due regard is paid to them, and that the public faith which has been pledged by him is duly kept. The prosecuting officer has also the power to enter a nolle prosequi. It appears in each case that neither the city marshal nor Boyle had any authority from the district attorney to make the promises or hold out the inducements which they did. There is nothing in either bill of exceptions tending to show that the district attorney had anything to do with the prosecution in the police court. Neither of the defendants appeared before the grand jury, although they were at the courthouse from day to day when the grand jury was in session, ready to testify, relying on the promises of immunity made by the city marshal and by Boyle; and there is nothing tending to show that there was any expectation or understanding on the part of the district attorney that either was to testify as a government witness in the superior court, and neither did so testify. If an appeal had been made to the clemency of the court, it would no doubt have been competent for

¹ The opinion only is printed.

the court to take into consideration the inducements which had been held out and the promises that had been made, if any, by the city marshal and by Boyle. But what was done was to plead the promises and inducements in bar. A question of law was thus presented, and we think that the ruling of the court was clearly right.

Exceptions overruled.¹

VII. CUSTOM.

LAWRENCE v. STATE.

(Court of Appeals of Texas, 1886. 20 Tex. App. 536.)

The indictment in this case charged the appellant with the theft of two hogs, of the aggregate value of \$40, the property of B. C. Hutchins, in Gonzales county, Tex., on the 1st day of December, 1883. His conviction and the penalty assessed, are expressed in the verdict, to which allusion is made in the opinion, as follows:

"We, the jury, find the defendant guilty of theft of property of value of less than \$20, and assess his punishment at six months confinement in the county jail and \$400 fine."²

WHITE, Presiding Judge. No error was committed in refusing to admit proof that it was a general custom of the country that any one had the right to kill all unmarked hogs over 12 months old running on the range. It is true that the law requires that the owner shall place his earmark upon hogs, sheep, and goats on or before they are 6 months old (Rev. St. 1879, art. 4558); but a failure to do so does not affect, much less destroy, the owner's right to his property. His recorded mark is not even required as the best evidence of ownership, as is the case with brands. Rev. St. 1879, art. 4561; Dixon v. State, 19 Tex. 134; Johnson v. State, 1 Tex. App. 333; Love v. State, 15 Tex. App. 563; Dreyer v. State, 11 Tex. App. 632. To fraudulently take such property when unmarked is as much theft as if it had been marked. This is the rule of the law, and ignorance of the law is no excuse. Pen. Code, art. 14. "A rule of law can never be subverted by local custom. To sanction the doctrine that it could would be to unsettle the law, would open for discussion and neighborhood proof, not the facts, but the law, and allow such neighborhood the right to claim a distinct law of its own, thereby destroying the beauty of the law, which consists in the uniformity of its action

¹ Where it is provided by statute that no case shall be dismissed without permission of the presiding judge, an agreement of the district attorney to dismiss a case, provided the defendant will become a witness for the state, is not binding on the state if the judge does not consent thereto. See Tullis v. State, 41 Tex. Cr. R. 87, 52 S. W. 83 (1899).

By statutes of limitation many states prescribe that prosecutions must be brought within a specified time after the commission of the offense.

² Part of this case is omitted.

throughout the land." *Dewees v. Lockhart*, 1 Tex. 535; *McKinney v. Fort*, 10 Tex. 220; *Russell v. A. Oppenheimer & Co., White & W. Civ. Cas. Ct. App.*, § 272; *Hudson v. Henderson*, Id. § 353; *Davie v. Lynch*, Id. § 696.

It would seem that the case of *Debbs v. State*, 43 Tex. 650, announces a different doctrine, and in so far as it does it is hereby overruled. It is folly to talk about an individual gifted with enough intelligence to render him responsible for his acts honestly believing that he has the right to claim and appropriate all the unmarked yearlings, sheep, hogs, and goats in Texas that are a year old. Such a custom would be a monstrosity, which the law would never tolerate. It was not error to refuse defendant's special requested instruction as above quoted.

One of the instructions given by the court to the jury was as follows: "The jury are further instructed that if they believe from the evidence that the defendant took the hogs charged in the indictment, yet that he so took them with an honest belief, although he may have been mistaken in such belief, that he had the right or the authority to do so, or if the evidence on this point is such as to raise in your minds a reasonable doubt as to whether the defendant did believe he had the right to take such hogs, then in such case you will give him the benefit of such doubt and acquit him."

The instruction fully and sufficiently covered the important material issues in the case with reference to which the appellant is here complaining. If he wished more specific instructions upon these points, he should have asked them, and presented them in such shape as that the court could give them, whilst a court may qualify or modify an instruction which is asked, so as to make it present the law as the court conceives the law to be, yet the court is not bound to qualify or modify an illegal or erroneous instruction, but may refuse it outright. We are of opinion that the verdict of the jury is sufficiently definite and specific under our present statute. *Pen. Code*, art. 748. There is some conflict in the evidence; but, if the testimony of the state's witnesses is believed, the proof is amply sufficient to support the verdict and judgment, and the judgment is affirmed.

Affirmed.²

² *Accord*: On indictment for larceny, *Commonwealth v. Doane*, 1 Cush. (Mass.) 5 (1848); riot, *Bankus v. State*, 4 Ind. 114 (1853); *Crockford v. State*, 73 Neb. 1, 102 N. W. 70 (1905); indecent exposure, *Reg. v. Reed*, 12 Cox, C. C. 1 (1871); *Hendry v. State*, 39 Fla. 235, 22 South. 647 (1897); embezzlement, *Bolin v. State*, 51 Neb. 581, 71 N. W. 444 (1897); *People v. Flechter*, 44 App. Div. 199, 60 N. Y. Supp. 777 (1899).

SECTION 10.—EFFECT OF COERCION.

I. COVERTURE.

If a ceorl steal a chattel and bear it into his dwelling, and it be attached therein, then shall he be guilty for his part, without his wife, for she must obey her lord. If she dare to declare by oath that she tasted not of the stolen property, let her take her third part. Laws of King Ine., c. 57.

A wife, however, who is the spouse of a thief, shall not be liable for the act of the man, because she ought not to accuse her husband nor to disclose his theft or felony, since she has not any power over herself, but her husband has. She ought not, however, to consent to the felony of her husband, nor to be his confederate. * * * It is not, therefore, in every case that the woman is to be set free, on account of her counsel, aid, or consent, according as they have been accomplices in the crime, they shall be partakers in the punishment. Bracton, book 3, c. 32.

SARAH CONNOLLY'S CASE.

(Durham Assizes, 1829. 2 Lew. 229.)

The prisoner was indicted for uttering base coin.

The evidence was that she had gone from house to house uttering base coin, and that her husband accompanied her to the door, but did not go in.

BAYLEY, J., directed the jury to infer that she was acting under the coercion of her husband, and to find her not guilty.

REX v. HUGHES.

(Lancaster Assizes, 1813. 2 Lew. 229.)

Martha Hughes, the wife of Patrick Hughes, was indicted for forging and uttering three £2 Bank of England notes.

James Platt proved that he went to the shop of the prisoner's husband, in consequence of a conversation which he had had some time before with the husband. The husband was not present. The prisoner beckoned him to go into an inner room, into which she followed him, when he told her what her husband had said to him. They then agreed about the business, and the witness bought of the prisoner three £2 notes at £1 4s. each.

The witness paid her four £1 notes and was to receive 8s. in change. When he was putting the notes into his pocketbook, and before he received the change, the husband put his head into the room and looked in, but did not come in or interfere in the business, further than by saying, "Get on with you!" When the witness and the prisoner returned into the shop, the husband was there and the prisoner gave him the change, and both the prisoner and the husband cautioned him to be careful.

On these circumstances being proved, Cross, for the prisoner, objected that they clearly established that she acted under the coercion of her husband. Supposing both husband and wife on their trial, this evidence would be sufficient to convict him; and he submitted that, if so, she must in this case be acquitted. He cited 2 East's P. C. 259: "If a wife be guilty of larceny in company with her husband, both of them may be indicted; and if the husband be convicted, the wife shall be acquitted." 1 Hale, 46; Kelynge, 37: "But if the husband be acquitted, and it appear that the felony were by her own voluntary act (by which must be understood that her husband, if present, had no knowledge of or participation in the fact), she may, upon the same indictment, be convicted, for the charge is joint and several." The acquittal or conviction, therefore, of the husband, regulates that of the wife. Here the husband might have been convicted.

THOMPSON, B. (stopping Park and Rain). I am very clear as to the law on this point.

The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie*, and *prima facie* only (as is strongly laid down by Lord Hale), that it was done under his coercion. But it is absolutely necessary that the husband should be actually present and taking a part in the transaction.

Here it is entirely the act of the wife. It is, indeed, in consequence of a communication previously with the husband that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness.

There was a putting off before the husband came; and it was sufficient if, before that time, she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law, out of tenderness, refers it, *prima facie*, to his coercion; but, when it has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of his wife) can be referred to what was done in his absence.

Objection overruled.

"When coercion is once established, it should shield the wife—at least until it appears that she has been relieved from its influence—and we do not think that, after being coerced into giving assistance to her husband, simply

SEILER v. PEOPLE.

(Court of Appeals of New York, 1879. 77 N. Y. 411.)

FOLGER, J.¹ The most that can be claimed for the evidence in this case is that the plaintiff in error was in company with the man Brown, just before and just after the larcenous act. She was not near to him when it was done. He was 200 feet or more away.

because she may be the most active in consummating the offense, that this should, as matter of law, make her guilty. On the contrary, the question should still depend on the cause of her increased activity, and not upon the fact of such activity. The presence and constraint of her husband may still be the cause, and not her own wickedness." Simpson, C. J., in *State v. Houston*, 29 S. C. 108, 6 S. E. 943 (1888).

¹ Part of this case is omitted.

"There was a case of arson before me on the Home Circuit. The man and wife were tried together, and it appeared that the man, though present, was a cripple, and bed-ridden in the room, and I held, after conferring with my Lord Chief Justice Tindal, that the circumstances under which the man was repelled the presumption of coercion." Vaughan, J., in *Reg. v. Cruse*, 2 Moo. 53 (1838).

Under a statute allowing, but not compelling, a wife to testify in a criminal case in which her husband is defendant, if, in giving her testimony, her husband being present, she commits perjury, the presumption of coercion does not arise. *Commonwealth v. Moore*, 162 Mass. 441, 38 N. E. 1120 (1894). See, also, *Smith v. Meyers*, 54 Neb. 1, 74 N. W. 277 (1898). Nor does the presumption arise on an indictment for keeping a gaming house, *Rex v. Dixon*, 10 Mod. 335 (1715); or a bawdy house, *Reg. v. Williams*, 10 Mod. 63 (1711), even though her husband resided in the house and hired, furnished, and provided for it, *Commonwealth v. Cheney*, 114 Mass. 281 (1873).

Gantt, P. J., in *State v. Ma Foo*, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414 (1891): "Learned counsel for defendant desire us to ingraft an additional modification on this rule of evidence, and require the state to go further and prove that the husband not only was not the inciter or responsible criminal agent in the commission of the crime, but that he actually disapproved it, and, in the absence of evidence of his disapproval, the wife must be acquitted. This is not the law. There is little in the present organization of society upon which the prima facie presumption itself can stand, and certainly nothing calling for any extension of the presumption."

"Before *Somerville's Case*, 26 Eliz., and *Somerset's Case*, A. D. 1615, I find no exception to the general rule that the coercion of the husband excuses the act of the wife. See 27 Ass. 40, *Stamf. P. C.* 26, 27, 142; *Poulton de Pace Regis*, 130 Br. Ab. Coron. 108; *Fitz. Ab. Coron.* 130, 180, 199. But after these cases I find the following exceptions in the books: *Bac. Max.* 57, except treason only. *Dalton*, c. 147, treason and murder, citing for latter *Mar. Lect.* 12 (which I conceive refers to the reading of *Marrow*, a Master in Chancery in the time of Henry VII. See *Willes v. Bridger*, 2 B. & A. 262). 1 *Hale*, P. C. pp. 45, 47, treason, murder, and homicide; and page 434, treason, murder, and manslaughter; *Kel.* 31, an obiter dictum, murder only; *Hawk. b. 1*, c. 1, § 11, treason, murder, and robbery; *Bl. Com.* vol. 1, p. 444, treason and murder; vol. 4, p. 29, treason and mala in se, as murder and the like. *Hale* therefrom alone excepts manslaughter, and *Hawkins* introduces robbery, without any authority for so doing; and, on the contrary, in *R. v. Cruse*, 8 C. & P. 545, a case is cited, where *Burrough, J.*, held that the rule extended to robbery. It seems long to have been considered that the mere presence of the husband was a coercion (see 4 *Bl. Com.* 28), and it was so contended in *R. v. Cruse*; and *Bac. Max.* 56, expressly states that a wife can neither be principal nor accessory by joining with her husband in a felony, because the law intends her to have no will; and in the next page he says: 'If husband and wife join in committing treason, the necessity of

It may be that his eye was upon her, and that she knew it; no more than that.

It was not error for the court, therefore, to state to the jury the distance off which Brown was shown to be; especially as it was stated, on which to remark to them, that it was for them to say whether that fact did not rebut the presumption that she was coerced by him, and to find whether she was in his presence.

The request to charge that if the four conspired to steal she must be presumed to be coerced by him, if when she entered the store he was at the entrance, was well denied. His command or procurement would not excuse her. The theft was not done while he was at the entrance. He had passed on before that. It is the presence of the husband at the thieving act which raises the presumption.

The court was right in telling the jury that the questions were whether Brown was her husband, and was present when the theft was done. It was right in refusing to charge that the facts were proven from which coercion was to be presumed; for the presence of Brown at the act was not proven. There was no error on the trial.

The judgment should be affirmed.

Judgment affirmed. All concur.

II. COMMAND.

MEMORANDUM, 1660.

(Kelyng, 13.)

Upon the trial of one Axtell, a soldier who commanded the guards at the King's Tryal, and at his murder; he justified that all he did was as a soldier, by the command of his superior officer, whom he must obey or die. It was resolved that was no excuse, for his superior was a traitor, and all that joined him in that act were traitors, and did by that approve the treason; and where the command is traitorous, then the obedience to that command is also traitorous.

obedience doth not excuse the wife's offense, as it does in felony.' * * * Dalton cites the exception from Bacon without the rule, and Hale follows Dalton, and the other writers follow Hale; and it seems by no means improbable that the exceptions of treason and murder, which seem to have sprung from Somerville's and Somerset's Cases, and which were probably exceptions to the rule as stated by Bacon, have been continued by writers without adverting to their origin, or observing that the presence of the husband is no longer considered an absolute excuse, but only affords a *prima facie* presumption that the wife acted by his coercion." Russell on Crimes (International Edition), p. 146, note by Greaves.

RIGGS v. STATE.

(Supreme Court of Tennessee, 1866. 3 Cold. 85, 91 Am. Dec. 272.)

The plaintiff in error was convicted at the August term, 1866, of murder in the second degree, and sentenced to 15 years' imprisonment in the penitentiary, from which he appealed. Judge James P. Swan, presiding.

SHACKELFORD, J., delivered the opinion of the court.

The plaintiff in error was indicted in the circuit court of Jefferson county for the killing of Capt. Thornhill. A change of venue was had to the county of Grainger. At August term, 1866, of the circuit court of Grainger county, he was convicted by a jury, of murder in the second degree, and sentenced to 15 years' imprisonment in the penitentiary.

A new trial was moved for, which was overruled, and an appeal taken to this court.

The court, among other things not excepted to, charged the jury in substance as follows: "A soldier in the service of the United States is bound to obey all lawful orders of his superior officers, or officers over him, and all he may do in obeying such lawful orders constitutes no offense as to him. But an order, illegal in itself and not justified by the rules and usages of war, or in its substance being clearly illegal, so that a man of ordinary sense and understanding would know, as soon as he heard the order read or given, that such order was illegal, would afford a private no protection for a crime committed under such order, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same a crime in law. Any order given by an officer to his private, which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him. No person in the military service has any right to commit a crime in law, contrary to the rules and usages of war, and outside of the purposes thereof; and the officers are all amenable for all crimes thus committed, and the privates likewise are answerable to the law for crimes committed in obeying all orders illegal on their face and in their substance, when such illegality appears at once to a common mind, on hearing them read or given." We think there is no error in this charge.

It is a well-settled principle a soldier is not bound to obey an illegal order. If he does, and commits an offense, it is no justification to him, and he is liable to be proceeded against and punished. This principle was settled in the Supreme Court of the United States in the case of *Mitchell v. Harmony*, 13 How. 129, 14 L. Ed. 75, in

which it was held a military officer cannot rely on an apparently unlawful order of his superior as a justification.

The same principle was recognized and settled in the Court of King's Bench, reported in 1 Cowp. 180. In this case a captain in the English navy, by orders of the British admiral, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, and the health of the sailors was thereby much injured. The motive was a laudable one, and done for the public service: The courts say it was an invasion of the rights of private property without the authority of law, and the officer who executed the order was held liable. This being the rule in civil causes, the principle would be more strictly applied in criminal ones. No order, if any was given, could justify the killing of Capt. Thornhill, and the parties who did the act are amenable to the criminal law. There being no error in the charge of the court, the question arises: Do the facts in the record sustain the verdict of the jury? And under the rulings of this court it is made our duty in criminal causes to examine the proof and see if it warrants the conviction.¹

The proof does not satisfy us the prisoner aided or abetted in the unlawful act of killing. A private soldier, when detailed by his superior officer, has no discretion. By the rules of war he is bound to obey the orders of those in command. When he enters the service, unconditional submission to the lawful orders of his superior officers is a duty imposed upon him by his oath and the articles of war. The principle of law, "when men are assembled for an illegal purpose, and the commission of an offense by any one of the party is the act of the whole," is not applicable to this case. The plaintiff in error being a private soldier, being detailed, was bound to obey the lawful order. The going to Richard Thornhill's without a knowledge of the purpose for which the force was detailed was not an illegal act; he had no right to inquire of the officer the object and purpose of the detail, or what he had in view; and, if he was present, unless he participated in the killing by firing, or aided and abetted in the act of killing, he would not be criminally responsible. It is stated as a principle of law, in 1 Hale, Pleas of the Crown, 444, and which we recognize and approve: "Although if many come upon an unlawful design, and one of the company kill the adverse party in pursuance of that design, all are principals, yet if many be together upon a lawful account, and one of the company kill another of an adverse party, without any particular abetment of the rest to this fact of homicide, they are not all guilty that are of the company, but only those that gave the stroke, or actually abetted them to do it." We forbear to comment further upon the testimony, as

¹ Part of the opinion is omitted.

the case will undergo another investigation before a jury. We are not satisfied, from the proofs in this record, with the verdict of the jury.

The judgment will be reversed, and a new trial awarded.²

RESPUBLICA v. McCARTY.

(Supreme Court of Pennsylvania, 1781. 2 Dall. 86, 1 L. Ed. 300.)

The defendant was indicted for high treason, in levying war, etc., by joining the armies of the king of Great Britain.

McKEAN, C. J.³ The crime imputed to the defendant by the indictment is that of levying war, by joining the armies of the king of Great Britain. Enlisting, or procuring any person to be enlisted, in the service of the enemy, is clearly an act of treason. By the defendant's own confession it appears that he actually enlisted in a corps belonging to the enemy; but it also appears that he had previously been taken prisoner by them and confined at Wilmington. He remained, however, with the British troops for 10 or 11 months, during which he might easily have accomplished his escape; and it must be remembered that, in the eye of the law, nothing will excuse the act of joining an enemy but the fear of immediate death—not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. But, had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period.⁴

Verdict—Not guilty.

² Accord: *U. S. v. Jones*, 3 Wash. C. C. (U. S.) 209, Fed. Cas. No. 15,494 (1813); *In re Fair* (C. C.) 100 Fed. 149 (1900).

See, for command of master, *Sanders v. State* (Tex. Cr. App.) 26 S. W. 62 (1894); parent, *People v. Richmond*, 29 Cal. 414 (1866). Compare *Reg. v. Boober*, 4 Cox, C. C. 272 (1850).

In *State v. Ash*, 33 Or. 86, 54 Pac. 184 (1898), it was held that a police officer, who agreed for a reward to protect the keeper of a bawdy house from prosecution, could not escape responsibility therefor by proof that in so doing he acted under the orders of his superior officer, to whom he gave the reward.

³ Part of this case is omitted.

⁴ Accord: *U. S. v. Vigol*, 2 Dall. 346, Fed. Cas. No. 16,621, 1 L. Ed. 409 (1795); mutiny, *U. S. v. Haskell*, 4 Wash. C. C. 402, Fed. Cas. No. 15,321 (1823).

BREWER v. STATE.

(Supreme Court of Arkansas, 1904. 72 Ark. 145, 78 S. W. 773.)

RIDDICK, J.¹ The only remaining questions relate to the instructions given by the court to the jury. The court refused to instruct the jury that, if the defendant shot Dortch under compulsion by third parties to save his own life, they should acquit, but, on the contrary, told them that, though one may lawfully kill an assailant, if it be necessary to save his own life, he cannot lawfully slay an innocent third person, even to save his own life, but ought to die himself, rather than take the life of an innocent person. The question presented by the exception to this ruling has been discussed by text-writers more often than by the courts. But we feel very certain that unlawful compulsion of the kind set up as a defense in this case is not a sufficient justification for taking the life of an innocent person. Sand. & H. Dig. § 1448; *Arp v. State*, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137; *Reg. v. Tyler*, 8 Car. & P. 616; *Reg. v. Dudley*, 14 Q. B. Div. 273; 4 Blackstone, 30. Whether, under some circumstances, compulsion of that kind might go to reduce the grade of the offense and in mitigation of the punishment, we need not stop to inquire; for, if we shall concede that this was so, the evidence here does not establish any such compulsion. The only evidence to prove compulsion was a confession made by the defendant. While all parts of the confession must be considered, yet the jury were not required to believe such portions of it as seemed to them unreasonable and improbable. And, though they found that Brewer killed Dortch, they no doubt rejected the improbable story that he did so under compulsion by armed men, who walked through the woods with masks on their faces, stopping occasionally to rub on the bottom of their shoes a red-looking liquid, which they kept in a bottle. This part of the confession was certainly uncorroborated, and was first concocted and told by Brewer to one of his friends under the belief that bloodhounds were about to be put on the trail. It was no doubt an effort on his part to put forth some plausible excuse that might shield him in the event he was run down and arrested. But, if we take this confession as literally true, it does not show that defendant had no other option, except to lose his own life or take that of Dortch. He said that two men armed with a shotgun and pistol captured him, and compelled him to pilot them to the Dortch place, and then gave him one of the shotguns and ordered him to kill Dortch; but he does not show why, after getting possession of the gun, he did not turn upon them and defend himself. The tracks where defendant lay in wait showed that only one man was there, and the circumstances indicated that besides Dortch there was present at the time he was killed only the

¹ Part of the opinion is omitted.

man who fired the shot. A compulsion that could reduce or mitigate such a crime must have been more than a fear of future harm. It should appear that the danger of resisting such a force was immediate and impending. The confession does not locate the position of the masked men at the time the shot was fired, or show that there was no alternative for the defendant, except to kill Dortch or lose his own life. For this reason we think that the presiding judge was fully justified in telling the jury that under these circumstances compulsion was no justification or excuse for the crime charged.

On the whole case we find no prejudicial error, and are convinced that the judgment was right. It is therefore affirmed.²

III. NECESSITY.

UNITED STATES v. ASHTON.

(Circuit Court of the United States, 1834. 2 Sumn. 13, Fed. Cas. No. 14,470.)

Indictment against the defendants for an endeavor to commit a revolt on board the ship *Merrimack*, of Boston, on the high seas. Plea, not guilty.

At the trial it appeared that the ship sailed from Boston on Saturday, 23d of August, 1834, on a voyage to Rio Janeiro, under the command of Capt. Eldridge. She was then in a leaky condition, and some efforts had been made by the captain to conceal the extent of the leakage from the crew at the time of their shipment and coming

² See, also, *Leach v. State*, 99 Tenn. 584, 42 S. W. 195 (1897); *State v. Fisher*, 23 Mont. 540, 59 Pac. 919 (1899). But see *People v. Repke*, 103 Mich. 459, 61 N. W. 861 (1895).

"The appellant has been indicted and convicted of the offense of perjury. The sole defense attempted to be proved was that appellant's life had been threatened by one Veto Dodd, unless he should go into court and testify so as to criminate himself and certain other persons who were suspected of having murdered a negro man and his wife, tenants upon the farm of Dodd.

"We can conceive of cases in which an act, criminal in its nature, may be committed by one under such circumstances of coercion as to free him from criminality. The impelling danger, however, should be present, imminent, and impending, and not to be avoided.

"Such was not the character of the duress here, and the appellant was not only possessed of the power and right of protecting himself, but he also could have appealed to the law to shield him from the threatened danger.

"If Dodd, by whom the threats were made, should attempt to carry them into execution, the appellant might lawfully oppose force to force, and, if necessary, might, in the defense of his person, lawfully slay his assailant; but, if appellant feared the superior strength or courage of Dodd, he might have invoked the protection of the court."

Cooper, J., in *Bain v. State*, 67 Miss. 557, 7 South. 408 (1890).

There are intimations in some of the cases that duress, though it does not excuse a homicide, may reduce the grade of the crime, as it may prevent the defendant forming a "willful, deliberate, and premeditated intent." See *Rizzolo v. Commonwealth*, 126 Pa. 54, 17 Atl. 520 (1889); *State v. Nargashian*, 26 R. I. 299, 58 Atl. 953, 106 Am. St. Rep. 715 (1904).

on board. The ship was 29 years old. The crew, on discovering the leak in going out of port, expressed a wish to the captain to return and have repairs made. The captain declined, but said if the leak increased he would return. On Wednesday, the 27th of August, the vessel encountered a gale and strained very much; and the crew were up all the night pumping, and were much exhausted. The gale still continued, with every appearance of a continuance. The crew then conversed together, and went to the captain and requested him to return to Boston to repair, and expressed a firm belief that the ship was unseaworthy and that they were all in imminent danger of their lives. The captain declined, but proposed that they should keep on, and, if necessary, he would stop at the Western Islands for repairs. The crew insisted that he ought to return back to Boston, and that the hazard of proceeding on the voyage was imminent; and then, finding that the captain persisted in going on the voyage, declaring that he thought the vessel seaworthy, they refused to do duty any further, and seceded, and remained below several hours, during which time the gale increased, and the ship was in great danger. The captain, at length, in order to induce the crew to return to duty, agreed to return to Boston; and accordingly he wore ship and returned to Boston, where he arrived on the ninth day after her departure. The crew at all other respects conducted themselves unexceptionably.

STORY, J.¹ I do not think that the act for the government and regulation of seamen in the merchants' service (Act July 20, 1790, c. 56, 1 Stat. 131) has any bearing on the present case. The third section of that act merely provides for the case where the mate and a majority of the crew of a vessel bound on a foreign voyage, after the voyage is begun and before the vessel shall have left the land, shall discover the vessel to be too leaky or otherwise unfit to proceed on the voyage, and under such circumstances it makes it the duty of the master to return to port. It does not in the slightest manner trench upon the general rights and duties of the seamen under the maritime law, but merely imposes an absolute duty on the master in the case specified. All other cases and circumstances remain, therefore, as they were before, to be governed by the general principles of law. In the present case the combination to resist the authority of the master is clearly established, and unless the seamen were, by the circumstances, justified in compelling the master to return home, the offense charged in the indictment is fully made out; and the onus is on the seamen to establish the justification. If the ship was at the time clearly seaworthy and fit for the voyage, whether the seamen acted by fraud, or by mistake, or upon a fair, but false, judgment of the facts, it seems to me the offense was committed. If, on the other hand, the ship was at the time clearly unseaworthy and

¹ Part of this case is omitted.

unfit for the voyage, they were fully justified in insisting upon her return home, and were guilty of no offense. The law deems the lives of all persons far more valuable than any property, and will not permit a master, under color of his acknowledged authority on board of the ship, from rashness, or passion, or ignorance, to hazard the lives of the crew in a crazy ship, or compel them to encounter risks and perform duties which are so imminent and overwhelming that they can escape only by the most extraordinary chances, and, as it were, by miraculous exertions. If he should order them into a boat on the ocean, at a time when they could scarcely fail of being swamped or foundered, they would not be bound to obey. His commands, to be entitled to obedience, must, under the circumstances, be reasonable. The proposition cannot for a moment be maintained that the crew are bound to proceed on the voyage in an unseaworthy and rotten ship, at the imminent hazard of their lives, merely because the master and officers choose in their rashness of judgment to proceed. It is true that in all cases of doubt the judgment of the master and officers ought to have great weight, and from their superior intelligence, ability, and skill it may be relied on with far more confidence than that of the crew. They are embarked in the same common enterprise and risks, and it cannot be ordinarily presumed that they will hazard their own lives in a vehicle which is really unfit for the voyage. Still, if the case does occur, if they will insist on proceeding, no matter at what hazard to life, and the ship is unseaworthy, I am clear that the crew have a right to resist, and to refuse obedience. It is a case of justifiable self-defense against an undue exercise of power. Neither of these cases is of any real difficulty. But the case of difficulty is this: Suppose the ship to be in that state in which the presumption of apparent unseaworthiness really arises, and the crew bona fide act upon that presumption, and the jury should be of opinion that they acted justifiably upon that presumption at the time; and suppose upon the trial it should turn out (as in the present case it may) that there is real doubt whether the ship be seaworthy or not, or upon the evidence the case is nearly balanced in the conflict of credible, as well as competent, testimony, and the jury should on the whole deem the preponderance of evidence just enough to turn the scale in favor of seaworthiness, but not to place it entirely beyond doubt; I ask whether, under such circumstances, the crew ought to be convicted of the offense charged, having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert that they should have done the same, and where even the jury themselves might adopt the same opinion, although there might be an error in the fact of seaworthiness, as established at the trial? I have great difficulty in coming to the conclusion that under such circumstances the crew were guilty of the offense charged. I am aware of the dangers of not upholding with a steady hand the authority

of the master; but I am not the less aware of the necessity of having a just and tender regard for life. Seamen, when they contract for a voyage, do not contract to hazard their lives against all perils which the master may choose they shall encounter. They contract only to do their duty and meet the ordinary perils, and to obey reasonable orders. The relation between master and seaman is created by the contract; but that relation, when created, is governed by the general principles of law. Unlimited submission does not belong to that relation. I have great repugnance to creating constructive offenses, and especially where there is perfect integrity of intention. I am aware that in some cases crimes may be committed independently of any supposed intention to do wrong. But in most cases, and I think in a case of this nature, the intention and the act must both concur to constitute an offense. There are cases even of the highest crimes, as of homicide, where an honest and innocent mistake in killing another, under circumstances of a reasonable presumption, though a mistaken one, that the party killed intended to kill the other party, when the latter will be excused by law.

I have had this subject a good deal in my thoughts during the progress of this trial (and the point is certainly a new one); and the strong inclination of my opinion at present is, subject to be changed by any argument hereafter urged, that the defendants ought not to be found guilty, if they acted bona fide upon reasonable grounds of belief, that the ship was unseaworthy, and if the jury, from all the circumstances, are doubtful whether the ship was seaworthy, or even in a measuring cast should incline to believe the ship seaworthy. If she was clearly seaworthy beyond reasonable doubt, then the defendants ought to be convicted, for the facts of the combination and resistance are admitted.

Mem. Upon these suggestions of the court, the district attorney said that his own opinion coincided with that of the court, and that he would enter a nolle prosequi, but he had thought it his duty to bring the case before the court; and the court said that the case was very properly brought before it for decision.²

² In *Reg. v. Dudley & Stephens*, 15 Cox, C. C. 624 (1884), the prisoners and a boy were cast away on the high seas 1,600 miles from land, and were compelled to put out in an open boat. Having drifted for eight days without food and for six days without water, the prisoners killed the boy, who was quite helpless and unable to make any resistance, and fed upon his body for four days, when they were picked up by a passing vessel. The prisoners were indicted for murder, and the jury found a special verdict: "That if the men had not fed upon the body of the boy, they would probably have died of famine; that the boy, being in a much weaker condition, was likely to have died before them; that at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief; that under the circumstances there appeared to the prisoners every probability that unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation; that there was no appreciable chance of saving life, except by killing some one for the others to eat; that, assuming any necessity to kill anybody, there was no greater necessity for killing the boy than of the

STATE v. GOFF.

(Supreme Court of Arkansas, 1859. 20 Ark. 289.)

Mr. Justice COMPTON delivered the opinion of the court.

Joshua Goff was indicted in the Crawford circuit court for laboring on the Sabbath, etc. The trial resulted in his acquittal, and the state appealed.

The facts as set out in the bill of exceptions, are briefly these: Goff was engaged cutting and binding wheat—a negro man cutting and Goff binding after him—on Sunday. For a week previous to the cutting, Goff was swapping work in harvest with his neighbors, who were afterwards to help him. Goff was a poor man, and had no cradle of his own, and waited to get one from his neighbor. When his neighbor quit cutting on Saturday evening, Goff got the cradle and hired the negro to cut for him the Sunday following. The weather was rather unsettled; rained the next day. Goff's wheat was very ripe and wasting, and from its appearance then had been ripe enough to cut four or five days before that time. This was all the evidence adduced on the trial.

The court, on motion of attorney for the state, charged the jury:

(1) That if they believed from the evidence that Goff was laboring in and about tying up wheat on Sunday, etc., within one year next before the finding of the indictment, and that said labor was other services than customary household duties, of daily necessity, comfort, or charity, they should find him guilty.

(2) That the mere fact of Goff being a poor man, and having no cradle of his own, would not justify him in having his wheat cut and tying it up on Sunday.

On motion of Goff, and against the objection of the attorney for the state, the court further charged the jury:

(1) That Goff had a right to preserve his property from waste on the Sabbath day, and if his property was going to waste, and likely to be lost by any unforeseen or unavoidable circumstance, he was justifiable in laboring to preserve it.

(2) That if the jury believe Goff could not have saved his wheat on any other day, and it was necessary either to do so on Sunday or suffer it to be lost, they must acquit.

The statute provides that every person who shall be found laboring

* * * men." Held, by the whole court, that the prisoners were guilty of murder.

In *U. S. v. Holmes*, 1 Wall. Jr. (U. S.) 1, Fed. Cas. No. 15,383 (1842), sailors and passengers having suffered shipwreck together, the sailors threw some of the passengers overboard to keep the boat from sinking, and, on an indictment for manslaughter, Baldwin, J., charged the jury that seamen had no right, even in cases of extreme peril, to sacrifice the lives of the passengers to preserve their own, and that, when it became necessary that some person should be sacrificed to preserve the lives of the company, the victims should be chosen by lot.

on the Sabbath day, or shall compel his apprentice, servant, or slave to labor or perform other services than customary household duties of daily necessity, comfort, or charity, shall be deemed guilty of a misdemeanor, etc. Gould's Dig. p. 373, c. 51, art. 5, § 1.

From an examination of the testimony it is manifest that there was no evidence whatever conducing to prove such a necessity for laboring on the Sabbath as is contemplated by the statute, nor of such necessity as is contemplated by the instructions given the jury at the instance of Goff. It was not shown that he even tried to procure a cradle, and from poverty or any other cause did not succeed. He was laboring for others when he should have been at work for himself, and "waited" until Saturday night to get a cradle.

The husbandman should look forward to the ripening of his grain as an event which must happen, and should make such timely provision for the harvest as not to violate the Sabbath. This is a duty enjoined alike upon the poor and the rich.

The instructions given by the court for Goff, if correct, were abstract, and under the circumstances were well calculated to mislead the jury.

The judgment must be reversed, and the cause remanded, with instructions to grant the state a new trial.

CHAPTER III.

THE CRIMINAL INTENT.

SECTION 1.—GENERAL PRINCIPLES.

All crimes have their conception in a corrupt intent and have their consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature.—Bacon's Maxims, Reg. 15.

"The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed, or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. * * * The mental element of most crimes is marked by one of the words 'maliciously,' 'fraudulently,' 'negligently,' or 'knowingly,' but it is the general—I might, I think, say, the invariable—practice of the Legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality; but I do not believe they are ever introduced into any statute by which any particular crime is defined. The meaning of the words 'malice,' 'negligence,' and 'fraud,' in relation to particular crimes, has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the malicious mischief act, and a third in relation to libel; and so of fraud and negligence. * * *

"With regard to knowledge of fact, the law, perhaps, is not quite so clear; but it may, I think, be maintained in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration: Can any one doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring

ones. *Levets' Case*, 1 Hale, 474, decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation, as far as regarded the homicide, as if he had killed a burglar. In the decision of the judges in *McNaghten's Case*, 10 Cl. & F. 200, it is stated that if, under an insane delusion, one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A bona fide claim of right excuses larceny, and many of the offenses against the malicious mischief act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith, and on reasonable grounds believed to exist when he did the act alleged to be an offense.

"Though this phrase (*non est reus, nisi mens sit rea*) is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds: It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea*, or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. '*Mens rea*' means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases, it denotes mere inattention. For instance, in the case of manslaughter by negligence, it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a *mens rea*, or 'guilty mind.' The expression, again, is likely to, and often does, mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime. It will, I think, be found that much of the discussion of the law of libel in *Shipley's Case*, 4 Doug. 73, 21 St. Tr. 847, proceeds upon a more or less distinct belief to this effect. It is a topic frequently insisted upon in reference to political offenses, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents. Like most legal maxims, the maxim on '*mens rea*' appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in

"actus non facit reum nisi mens sit rea"
a thing done is not evil unless the intention is evil also.

doing so. It is not one of the 'regulæ juris' in the digests. The earliest case of its use I have found is in the *Leges Henrici Primi*, v. 28, in which it is said: 'Si quis per coactionem abjurare cogatur quod per multos annos quiete tenuerit non in jurante set cogente perjurium erit. Reum non facit nisi mens rea.'¹ In Broom's *Maxims* the earliest authority cited for its use is 3 *Inst. c. 1*, fol. 10. In this place it is contained in a marginal note, which says that, when it was found that some of Sir John Oldcastle's adherents took part in an insurrection 'pro timore mortis et quod recesserunt quam cito patuerant,' the judges held that this was to be adjudged no treason, because it was for fear of death. Coke adds: 'Et actus non facit reum nisi mens sit rea.' This is only Coke's own remark, and not part of the judgment. Now Coke's scraps of Latin in this and the following chapters are sometimes contradictory. Notwithstanding the passage just quoted, he says in the margin of his remarks on opinions delivered in Parliament by Thyrning and others in the 21 R. 2: 'Melius est omnia mala pati quam malo consentire' (22-23), which would show that Sir J. Oldcastle's associates had a *mens rea*, or 'guilty mind,' though they were threatened with death, and thus contradicts the passage first quoted. It is singular that in each of these instances the maxim should be used in connection with the law relating to coercion."

Extract from the opinion of STEPHEN, J., in *Reg. v. Tolson*, 23 Q. B. Div. 168 (1889).

SECTION 2.—DISTINCTION BETWEEN INTENT AND MOTIVE.

SCHMIDT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit, 1904. 133 Fed. 257, 66 C. C. A. 389.)

GILBERT, Circuit Judge.² The plaintiff in error was indicted and prosecuted in the United States Circuit Court for the District of Washington upon an indictment containing ten counts, in each of which he was charged with swearing falsely in certain naturalization proceedings pending in the superior court of the state of Washington for Walla Walla county.

Error is assigned to the refusal of the court to instruct the jury "that, when the evidence fails to show any motive to commit the

¹ "The original source is S. Augustinus *Sermones*, No. 180, c. 2 (*Migne Patrol*, vol. 38, col. 974): 'Reum linguam non facit nisi mens rea.' This passes into the *Decretum C. 3, C. 22*, qu. 2. The author of the *Leges* took it from some intermediate book in which the linguam may possibly have disappeared." Pollock & Maitland's *Hist. Eng. Law*, vol. 2, p. 474, note 5.

² Part of the opinion is omitted.

crime charged on the part of the accused, this is a circumstance in favor of his innocence; and in this case, if the jury find upon careful examination of all the evidence that it fails to show any motive on the part of the accused to commit the crime charged against him, then this is a circumstance which the jury ought to consider, in connection with all the other evidence in the case, in making up their verdict."

This instruction so requested, while proper in some cases, had no rightful application to the evidence in the case before the court. It was clearly proven by the direct testimony of witnesses, and it was not disputed, that the plaintiff in error went to these aliens, who had not been in the United States the requisite time to entitle them to citizenship, and actively induced them to appear before the court and take out their final papers, and in that connection falsely testified before the court as charged in the indictment. The jury may inquire into the motive of a defendant when it is necessary to resort to it in arriving at the ultimate fact that it was he who committed the crime charged. The motive then becomes an aid in completing the proof of the commission of the act; and in such a case it is proper to charge the jury that the absence of motive, if they fail to find one, may be taken into consideration in determining the question whether the crime was committed by the accused or by some other. The instruction is particularly applicable to cases where the proof consists in circumstantial evidence. In such a case it may be controlling. *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846. That the plaintiff in error did falsely testify was not denied. His motive in so doing was not disclosed, and it was not necessary that it should be. While the prosecution is never required to prove a motive for the crime, it is always permitted to do so. In the present case the proof was not circumstantial, but was direct, and was undisputed. To have given the charge requested would have been to tell the jury that they were at liberty, in determining whether they would give credence to the positive and uncontroverted testimony of witnesses to the overt act of the plaintiff in error, to be influenced by the fact that they failed to find a motive for his act. Such is not the law.

The judgment of the District Court is affirmed.

REX v. REGAN.

(Central Criminal Court, 1850. 4 Cox, C. C. 335.)

The prisoner was indicted for maliciously and feloniously setting fire to a certain building, with intent to injure one Joseph Adams.

From the evidence it appeared that the prisoner had given notice of other fires, and had claimed the reward usually paid on such occa-

sions at the engine station, and he had apparently no other motive in setting fire to the premises in question than the expectation of getting such reward.¹

Payne, for the prisoner, contended ~~before the jury~~ that if they believed that the prisoner's intent was not to injure the prosecutor, but merely to obtain the reward for giving the earliest information, that he could not be convicted upon the indictment.

ERLE, J. I entirely dissent from this view of the case. If the prisoner willfully set fire to the premises, the jury will be perfectly justified in finding that his intent was to injure the person whose property they were, and who would necessarily be injured by such an act, although he might have an ulterior object of obtaining the reward. There have been several cases recently of persons administering poison to others for the purpose of obtaining the money for which their lives were insured, but no one ever dreamed that, because they were actuated by such a motive, they would be entitled to an acquittal when indicted for administering poison with intent to kill.

The prisoner was found guilty.²

REGINA v. SENIOR.

(Court for Crown Cases Reserved, 1898. 19 Cox, C. C. 219.)

This case, stated by WILLS, J., was as follows:

The prisoner was indicted and tried before me on the 24th day of November, 1898, for the manslaughter of his child, an infant of the age of nine months.

The child had died of diarrhœa and pneumonia. The prisoner had not supplied it with any medical aid or medicine, though aware that the case was of great gravity, and that the child would probably die.

The medical evidence was that the child's life would certainly have been prolonged, and in all probability saved, if medical assistance had been procured.

No question was raised as to the prisoner's ability to procure and pay for medical assistance, and it was shown that he earned about 35 shillings a week.

He was shown to have been a good and kind father in all other respects, and he bore an excellent character for general good conduct. He had had twelve children, of whom seven were dead, and he had had before experiences of the same kind as those relating to the present inquiry, for the question he put to the inspector of police was, "Except in regard to this case," and he then corrected himself, "Ex-

¹ Part of this case, involving a question of evidence, is omitted.

² See, also, *Walls v. State*, 7 Blackf. (Ind.) 572 (1845).

That the motive for the act done was a good one is likewise immaterial. *People v. Kirby*, 2 Parker, Cr. R. (N. Y.) 28 (1823).

cept in regard to these cases, have you ever known anything against me?"

The prisoner is a member of a sect called the "Peculiar People," whose religious doctrines as to the treatment of sick people are certainly to the ordinary apprehension remarkable. They base them upon the Epistle of James, chapter 5, verses 14 and 15: "Is any sick among you? Let him call for the elders of the church, and let them pray over him, anointing him with oil in the name of the Lord. And the prayer of faith shall save the sick, and the Lord shall raise him up, and if he have committed sins they shall be forgiven him." They do not allege that medical aid is here expressly forbidden, but say that to make use of it is to indicate a want of faith in the Lord.¹

The jury found the prisoner guilty, adding that they considered medical aid and medicine to have been necessary for the child, but that they were of opinion that the prisoner had done all that he could in the best interests of the child, except in not providing medical aid and medicine.

I said nothing to the jury as to whether the prisoner was acting bona fide and according to his conceptions of duty, because the learned counsel had in his opening speech said that it was not in question that he was so doing.

The prisoner was not represented by counsel, and I had not the advantage of any argument on his behalf as to the meaning of "willfully neglects" in St. 57 & 58 Vict. c. 41, and I therefore reserved the case for the opinion of the Court for Crown Cases Reserved.

The questions for the opinion of the court are whether my direction was right in law, and, if so, whether there was evidence upon which the jury could properly convict the prisoner. If both the questions are answered in the affirmative, the conviction is to stand; if either is answered in the negative, the conviction is to be quashed.

The prisoner was released on bail pending the decision of this court.

H. Sutton, for the prisoner. The prisoner, having done all that his conscience permitted him to do for the child, could not be guilty of neglect. The evidence was that he was attentive, and that he had provided a nurse for the child, and everything except drugs and medical attendance. These he did not provide because of his religious belief. He was not guilty of a culpable omission of duty at common law, for at common law he was not obliged to provide medical attendance or drugs for his child. *Reg. v. Hines*, 80 C. C. Sessions Papers, per Pigot, B., at page 312. Nor does the omission to provide medical attendance constitute culpable neglect at common law, if the omission is because of a religious belief. *Reg. v. Wagstaffe*, 10 Cox, C. C. 530; *Reg. v. Hurry*, 76 C. C. Sessions Papers, 63. The prisoner was not guilty of the statutory offense of willfully neglecting his child, for, although St. 31 & 32 Vict. c. 122, § 37, did make it

¹ Part of the statement is omitted.

an offense to willfully neglect to provide medical aid for a child to the injury of its health, that statute was repealed by St. 52 & 53 Vict. c. 44, § 18. The words "medical aid" are omitted from that statute, and from the prevention of cruelty to children act of 1894 (St. 57 & 58 Vict. c. 41), by which it again was repealed. In *Reg. v. Downes*, 33 L. T. Rep. 675, 1 Q. B. Div. 25, a conviction was upheld because of the words of St. 31 & 32 Vict. c. 122, § 37 (4), which was then in force.

Horace Avory, for the Crown, was not called on.

LORD RUSSELL, C. J. In this case we have to deal with a case stated by my Brother WILLS, on the trial of the defendant on a charge framed with reference to St. 57 & 58 Vict. c. 41. The first question we have to consider is whether the learned judge was right in his direction to the jury as to what constitutes willful neglect; and the second question is whether there was evidence on which the jury could convict the defendant of willful neglect. Now the charge is preferred under the first section, which provides that if any person who has the custody, charge, or care of any child under the age of 16 "willfully" (I omit the words which have no bearing on the point) "neglects" such child, that person shall be guilty of a misdemeanor. It is useful to refer to the history of the legislation on the subject. By St. 31 & 32 Vict. c. 122, § 37, which is a statute dealing with the relief of the poor, it was enacted that any parent who willfully neglected to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of 14 years, whereby the health of such child was seriously injured, was guilty of an offense. Therefore it became under that statute the duty of a parent to provide medical aid for his children. That statute was followed by a statute of 1889, with which it is not necessary to deal. It is important to remember that the statute of 1868 was passed after the judgment of Willes, J., in *Reg. v. Wagstaffe*, 10 Cox, C. C. 530; Willes, J., having given judgment in January, while the statute is dated August. We now come to the statute of 1894, and there is a great difference in the wording of the act, for "medical aid" is dropped. It is difficult to believe that the Legislature was taking a retrograde step, for the statute shows that it was passed in consequence of increased anxiety for the welfare of children. In the case we are now considering it is not disputed that the child was in a dangerous state, to the knowledge of the parent. It is not disputed, and the jury have found, that its life would have been saved if medical assistance had been given, and that the parent was in a position to provide medical aid; further, that the parent did not give medical aid, and that he did not because he believed to do so would be a want of faith in the methods which he believed to be prescribed by the Bible, and that he was otherwise an attentive parent; lastly, that the child died. These being the facts, the learned judge charged the jury as follows: "I told the jury that they must first of all be satisfied that the death of the child had been caus-

ed or accelerated by the want of medical assistance; secondly, that medical aid and medicine were such essential things for the child that reasonably careful parents in general would have provided them; and, thirdly, that the prisoner's means would have enabled him to do so without an expenditure such as could not be reasonably expected from him." Was that direction substantially right? I think it was. It seems to me to be the same, whether you take the words separately or conjoined. The words are, if a person "wilfully neglects." It seems to me very clear what this phrase means. "Wilfully" means done deliberately and not by inadvertence, and "neglect" the omission to do something for the benefit of the child—in other words, intentional failure to take those steps which the experience of mankind shows to be generally necessary. In these days the resources of medical science are within the reach of the humblest and the poorest. The learned counsel has argued with his invariable clearness that because the father was an affectionate parent, and because he neglected to provide nothing for the child except that which its condition urgently required, that it was impossible to say that he was guilty of wilful neglect. When a child breaks its thigh bone and an operation is necessary, which is in the highest degree dangerous while the child is in a state of consciousness, would the father be guilty of neglect if he refused to permit the administration of an anæsthetic drug? What if the child in an infantile complaint is in danger of suffocation, and it is necessary to perform tracheotomy, would it be wilful neglect to refuse to permit the use of an anæsthetic? I think that in either of these cases the parent would properly be convicted. I dissent entirely from the view said to have been expressed by Piggot, B., Reg. v. Hines, 80 C. C. Sess. Papers, p. 312, and I think that in this case an indictment for gross and culpable neglect could be supported at common law.

WILLS, J. This is a case of a class which so frequently comes before the judges that I thought it well to state the case in order that an authoritative decision might be delivered on the point.

GRANTHAM, J. I agree.

DAY, LAWRENCE, and WRIGHT, JJ., concurred.

Conviction affirmed.²

² See, also, bigamy by a Mormon, *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 241 (1878); beating drum in city in performance of religious exercises, *State v. White*, 61 N. H. 48, 5 Atl. 828 (1886).

SECTION 3.—CONSTRUCTIVE INTENT.

ISHAM v. STATE.

(Supreme Court of Alabama, 1862. 38 Ala. 213.)

The indictment in this case contained three counts; the first charging that the prisoner, who was a slave, the property of Capt. W. F. Hanby, "unlawfully and with malice aforethought killed George M. Hagood, by shooting him with a gun"; the second, that he "unlawfully and intentionally, but without malice, killed George M. Hagood, a white person," etc.; and the third, that he "unlawfully, but without malice or the intention to kill, killed George M. Hagood, a white person," etc. The circuit court sustained a demurrer to the third count, and the prisoner pleaded not guilty to the other counts.

The prisoner asked the court to charge the jury as follows: "If the jury believe, from the evidence that the deceased disguised himself, by blacking himself and the manner in which he was clothed, for the purpose of deceiving the prisoner and making him believe that he was a runaway slave, and under such disguise went to the prisoner's house on his master's premises at an unusual hour of the night, between midnight and day, and there, by his disguised condition and the manner in which he acted, deceived the prisoner, and that the prisoner in truth and in fact believed that the deceased was a runaway negro slave, and under that delusion shot and killed the deceased, then he is neither guilty of murder, nor of the voluntary manslaughter of a white person, nor of the involuntary manslaughter of a white person in the commission of an unlawful act." The court refused this charge, and the prisoner excepted.

The verdict of the jury was, "Guilty of voluntary manslaughter, as charged in the second count in the indictment."

A. J. WALKER, C. J.¹ It is not indispensable to the constitution of a crime that the prisoner should commit the very act intended. Certainly there must concur a wrongful intent and a wrongful act. But he who, aiming to accomplish one wrongful act, fails in that, but perpetrates another, is not excused. The wrongful intent and the wrongful act are said to coalesce and make the crime. Bishop on Cr. Law, § 254. Numerous illustrations of this doctrine are to be found in the books. Where there is a design to commit a felony, and a homicide ensues, against or beyond the intent of the party, he is guilty of murder; but, if the intent went no further than to commit a bare trespass, it will be manslaughter. 1 East's Cr. Law, 255. If A. gives a poisoned apple to B., intending to poison B., and B., igno-

¹ Part of this case, relating to another point, is omitted.

rant of it, gives it to a child, who takes it and dies, A. is guilty of the murder of the child, but B. is guiltless. And so, if one, out of malice at A., shoots at him, but misses him and kills B., it is no less murder than if he killed the person intended. Wharton's Cr. Law, § 965. These illustrations will suffice to show that, to the conviction of a slave for the homicide of a white man, it is not indispensable that there should exist an intent to kill a white person, or even a knowledge that the deceased was a white man. Indeed, one may be guilty of involuntary manslaughter, where there was no intent to kill. A homicide, resulting from an attempt to commit any unlawful act, would be manslaughter; and therefore, if a slave should shoot unlawfully at a beast, and by chance kill a white person, he would be guilty of the involuntary manslaughter of a white person in the commission of an unlawful act, although he might be ignorant of the proximity of the person slain. Surely the crime could not be less, if the purpose was to kill a negro instead of a beast; and yet such is the conclusion to which the argument for the prisoner would lead. The statute does not make a knowledge that the deceased was a white person an ingredient of the offense, and we cannot decide that it is. There being a criminal intent, the defendant is guilty, notwithstanding he was mistaken as to the person upon whom his unlawful purpose fell. See the authorities collected in 1 Bishop on Cr. Law, § 247, and on the Attorney General's brief.

The fifteenth of Lord Bacon's maxims is as follows: "In criminalibus, sufficit generalis malitia intentionis, cum facto paris gradus." 3 Bacon's Works, 238; Broom's Legal Maxims, 238. In reference to this maxim the learned author says: "All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor leveled, yet the law giveth him no advantage of that error, if another particular ensue of as high a nature." We do not find this maxim so recognized by subsequent writers on the criminal law, and by those adjudging criminal causes, as to induce us without hesitation to adopt it as a correct exposition. The explanation of the maxim would seem to imply that, to constitute the crime, it is only necessary that the act should be of as high a nature as the intent, and not to imply a denial that the crime might take its complexion from an act of criminality higher than the intent. If this be the construction, it would not aid the accused. If the maxim import that there must be a perfect correspondence between the intent and the act, it cannot be harmonized with principles too well established to be controverted. A homicide, not intended, but committed, in the perpetration of burglary or arson, would be murder, notwithstanding the offenses intended are not, in our law, of as high a grade or subject to as severe penalties as murder. We shall not engage in any speculation as to the true import and operation, or the authority, of the maxim, but shall content ourselves with

announcing the conclusion that we cannot be led by it to oppose the proposition which we now proceed to state, as follows:

A slave, who kills a white man, intending to kill a negro, is guilty of a criminal homicide in the degree in which he would have been guilty if the person slain had been a negro, and he is subject to the punishment prescribed for the commission of the offense upon a white person. The maxim, in its literal translation, only requires that the act should be of equal grade with the intent; not that the same punishment should be incident to the thing done as to the thing intended. Crimes may be of the same degree, and yet subjected by law, founded in public policy, to different punishments. The manslaughter of a white man by a slave and the manslaughter of a negro by a slave belong to the same degree of homicide, and yet are subjected to variant punishments. So, also, manslaughter committed with a bowie knife and manslaughter committed with a different weapon are offenses of the same degree, and yet there is a distinction made in the punishments prescribed. Numerous other illustrations might be drawn from our criminal law. In all those cases, as in this, the difference is not in the degree, but in the punishment; and the difference in the punishment is the result of some incident to the crime, which from public policy the law makes an aggravation. If, therefore, we take the maxim in its literal import, we find nothing inconsistent with our position.

In the case of *Bob v. State*, 29 Ala., 20, it was argued that the prisoner, a slave, when committing an assault and battery upon another slave, by accident struck and killed the deceased, who was a white person. In reference to that aspect of the case, this court said: "We hold that if a slave, in the attempt unjustifiably to commit an assault, or assault and battery, on another slave, kill a white person by misadventure, he is guilty of involuntary manslaughter, under section 3312 of the Code of 1852." This is an express adjudication of the point, made in this case, that a slave cannot be guilty of manslaughter of a white person, when the intent was aimed at a negro. If one, intending to beat a negro and unintentionally killing a white person, is guilty of the homicide of a white person, a fortiori is a slave thus guilty, when, intending to kill a negro, he by mistake kills a white person.

We are content to abide by the decision in *Henry's Case*, 33 Ala. 389. Upon the principle of that decision, the accused might be convicted of the involuntary manslaughter of a white person, under a count for the voluntary manslaughter of a white person. There was, therefore, no error in the charge given by the court.

The judgment of the court below is affirmed, and its sentence must be executed, as therein ordered.²

² See, also, *Rex v. Pedley*, Cald. 218 (1782); *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131 (1883); *Reddick v. Commonwealth* (Ky.) 33 S. W. 416 (1895).

REGINA v. PACKARD.

(Central Criminal Court, 1841. 1 Car. & M. 236.)

Manslaughter.

The facts of the case were as follows: The prisoner, John Richard Packard, was a chemist in Drury Lane; and on the 5th of November, 1841, an officer of the sheriff of Middlesex named Hamblyn, having a warrant against his goods, executed it about 12 at noon, and left the deceased, Michael Aungier, in possession for him. Aungier, according to the evidence of Hamblyn, was a man in good health, about 60 years of age, and was quite sober at the time he was left on the premises about 1 o'clock in the day. The deceased remained in the kitchen of the house, and was quite sober up to 9 o'clock in the evening. At that time John Richard Packard went into the kitchen, and the deceased asked him for a glass of gin. He replied, "Very well; you shall have it;" but instead of a glass of gin, gave him a glass of rum and water, which he drank. About half-past 9 J. R. Packard asked him to go into the parlor.

It further appeared that the remainder of the evening was spent by Aungier, John Packard, Joseph Packard, and Kennett in eating and drinking; that at half-past 1 o'clock Aungier was very drunk, and unable to help himself; that he was given more liquor by the prisoners, and then carried by them down the stairs and put into the cabriolet, two of the defendants riding on the box. The cabman, by direction of the prisoners, drove to Covent Garden, and, arriving there, the prisoners left the cabriolet without taking any notice of deceased, and ordered the cabman to drive to No. 18 Chancery Lane. The cabman drove to his destination, and, after fruitless efforts to arouse the inmates, drove to Bow street, took deceased from the cab and placed him on a doorstep, and waited for a policeman, who, coming up a few minutes later, pronounced Aungier dead.¹

PARKE, B. The first question will be whether the prisoners, or any of them, put the deceased into the cabriolet; and upon this I think nothing need be said. If you are of opinion that they did, then the questions will be: First, whether they, or any of them, were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose, or whether, when he had taken it, they put him into the cabriolet for an unlawful purpose. If you think that the three prisoners, or one of them, made him excessively drunk to enable the prisoner, John Richard Packard, to prevent the completion of the execution, or if you are satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple

¹ Part of this case is omitted.

fact of persons getting together to drink, or one pressing another to do so, is not an unlawful act, or, if death ensue, an offense that can be construed into manslaughter; and if what took place in the present instance was really and solely for the purpose of good fellowship, for making merry, or causing the misfortunes of the elder Packard to be forgotten, though the act was attended with death, this will not be a case of manslaughter. Upon the first question I have stated it will be essential to make out on this indictment that the prisoners administered the liquor with the intention of making the deceased drunk and then getting him out of the house; and if that be doubtful, still, if you think that, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case will be a case of manslaughter. If, however, you think they all got drunk together, and that afterwards he was put into the cabriolet with an intention that he should take a drive only, that was not an unlawful object, such as I have described, and the prisoners will be entitled to an acquittal; or if you entertain a conscientious doubt as to their real object, you ought also, on that ground, to acquit them. [His lordship then stated the circumstances of the case and proceeded.] The first point to be decided is whether the acts of the prisoners, whatever may be their character, were the cause of the death of the deceased. As to that, you are to look to the evidence of the surgeons, and see whether those acts caused the death of the deceased to take place when it did; that is to say, whether those acts accelerated his death. Now, it seems to result from what the surgeons say—and assuming the facts in evidence to be correct—that the acts of the prisoners did accelerate the death, and if you are of that opinion it will justify you in inquiring into those acts. One observation as to this is that one of the prisoners might have had a motive in getting the sheriff's officer out of possession voluntarily for the purpose of disposing of the goods he had seized, and that in furtherance of that motive the original object of all was to make him drunk, and so to get rid of him. But, supposing you cannot clearly trace that intention, still you will have to inquire with what view they put him into the cabriolet, left him in Covent Garden, and gave a false address, to which they directed he should be driven. It is true that there is no direct proof that any one pressed him to drink; but, if the liquor was placed before him with the illegal object I have mentioned, that would be enough without such direct proof. You will therefore consider whether all three, or any, of the prisoners had this illegal object; whether they made the deceased drunk with a view of getting rid of him from the house, and then, with the same intention, put him into the cabriolet; or whether, having made him drunk without any such original object, when he was drunk they put him into the cabriolet for the purpose of so getting rid of him; and whether you are sat-

ified that the acts of the prisoners, or any one of them, done with such illegal object, contributed to his death.

The jury retired to consider their verdict, and on their return into court asked a question of his lordship, in answer to which they were told that if the prisoners, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. They then immediately returned a verdict of

Guilty—and the prisoners were respectively sentenced to be imprisoned in Newgate for one calendar month.

REGINA v. FRANKLIN.

(Sussex Assizes, 1883. 15 Cox, C. C. 163.)

Charles Harris Franklin was indicted, before Field, J., at Lewes, for the manslaughter of Craven Patrick Trenchard.

The facts were as follows:

On the morning of the 25th day of July, 1882, the deceased was bathing in the sea from the west pier, at Brighton, and swimming in the deep water around it. The prisoner took up a good-sized box from the refreshment stall on the pier and wantonly threw it into the sea. Unfortunately the box struck the deceased, C. P. Trenchard, who was at that moment swimming underneath, and so caused his death.

Gore, for the prosecution, urged that it would, apart from the question of negligence, be sufficient to constitute the offense of manslaughter; that the act done by the prisoner was an unlawful act, which the facts clearly showed it to be; and cited the case of *Rex v. Fenton*, 1 Lewin's Cr. Cas. 179. This case is referred to in 1 Russell on Crimes, 638: "If death ensues in consequence of a wrongful act, which the party who commits it can neither justify nor excuse, it is manslaughter. An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding, and that in consequence of the scaffolding being so broken a corf in which the deceased was descending the mine struck against a beam on which the scaffolding had been supported, and by such striking the corf was overturned, and the deceased precipitated into the mine and killed. Tindal, C. J., said: 'If death ensues as the consequence of a wrongful act, which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill or do any serious injury in the particular case or any general malice, the offense becomes that of murder. In the present instance the act was one of mere wantonness and sport; but still

the act was wrongful. It was a trespass. The only question, therefore, is whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act. If it followed from such wrongful act, as an effect from a cause, the offense is manslaughter; if it is altogether unconnected with it, it is accidental death.' "

FIELD, J. This is a question of great importance; for, if I must follow the ruling of the very learned judge in *Rex v. Fenton*, *ubi supra*, it will be unnecessary to go into the question whether the prisoner was guilty of negligence. I will consult my Brother MATHEW upon the point.

FIELD, J., after a short interval, returned into court and said: I am of opinion that the case must go to the jury upon the broad ground of negligence, and not upon the narrow ground proposed by the learned counsel, because it seems to me—and I may say that in this view my Brother MATHEW agrees—that the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case. I have a great abhorrence of constructive crime. We do not think the case cited by the counsel for the prosecution is binding upon us in the facts of this case, and therefore the civil wrong against the refreshment-stall keeper is immaterial to this charge of manslaughter. I do not think that the facts of this case bring it clearly within the principle laid down by Tindal, C. J., in *Rex v. Fenton*. If I thought this case was in principle like that case, I would, if requested, state a case for the opinion of the Court of Criminal Appeal. But I do not think so.

It was not disputed that the prisoner threw the box over the pier, that the box fell upon the boy, and the death of the boy was caused by the box falling upon him.

Gill, for the prisoner, relied upon the point that there was not proved such negligence as was criminal negligence on the part of the prisoner.

FIELD, J., in summing up the case to the jury, went carefully through the evidence, pointing out how the facts as admitted and proved affected the prisoner upon the legal question as he had explained to them.

The jury returned a verdict of guilty of manslaughter.

The prisoner was sentenced to two months' imprisonment.

COMMONWEALTH v. ADAMS.

(Supreme Judicial Court of Massachusetts, 1873. 114 Mass. 323.)

Complaint for assault and battery.

At the trial in the superior court, before Bacon, J., it appeared that the defendant was driving in a sleigh down Beacon street, and was approaching the intersection of Charles street, when a team occupied the crossing. The defendant endeavored to pass the team while driving at a rate prohibited by an ordinance of the city of Boston. In so doing he ran against and knocked down a boy who was crossing Beacon street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance. The commonwealth asked for a verdict, upon the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery. The court so ruled, and thereupon the defendant submitted to a verdict of guilty, and the judge, at the defendant's request, reported the case for the determination of this court.

ENDICOTT, J. We are of opinion that the ruling in this case cannot be sustained. It is true that one in the pursuit of an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done willfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction: That if the act the party was doing was merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or mistake; but if *malum in se*, it is otherwise. 1 Hale, P. C. 39; Foster, C. L. 259. Acts mala in se include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done willfully or corruptly. Acts mala prohibita include any matter forbidden or commanded by statute, but not otherwise wrong. 3 Greenl. Ev. § 1. It is within the last class that the city ordinance of Boston falls, prohibiting driving more than six miles an hour in the streets.

Besides, to prove the violation of such an ordinance, it is not necessary to show that it was done willfully or corruptly. The ordinance declares a certain thing to be illegal. It therefore becomes illegal to do it, without a wrong motive charged or necessary to be proved; and the court is bound to administer the penalty, although there is an entire want of design. Rex v. Sainsbury, 4 T. R. 451, 457. It was held in Commonwealth v. Worcester, 3 Pick. (Mass.) 462, that proof only of the fact that the party was driving faster than the ordinance allowed was sufficient for conviction. See Commonwealth v. Farren, 9 Allen (Mass.) 489; Commonwealth v. Waite, 11 Allen

(Mass.) 264, 87 Am. Dec. 711. It is therefore immaterial whether a party violates the ordinance willfully or not. The offense consists, not in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned judge erred in ruling that the intent to violate the ordinance in itself supplied the intent to sustain the charge of assault and battery. The verdict must therefore be set aside, and a new trial granted.¹

REGINA v. LATIMER.

(Court for Crown Cases Reserved, 1886. 16 Cox, C. C. 70.)

Case stated by the learned Recorder for the borough of Devonport as follows:

The prisoner was tried at the April Quarter Sessions for the borough of Devonport on the 10th day of April, 1886.

The prisoner was indicted for unlawfully and maliciously wounding Ellen Rolston. There was a second count charging him with a common assault.

The evidence showed that the prosecutrix, Ellen Rolston, kept a public house in Devonport; that on Sunday, the 14th day of February, 1886, the prisoner, who was a soldier, and a man named Horace Chapple, were in the public house, and a quarrel took place, and eventually the prisoner was knocked down by the man, Horace Chapple. The prisoner subsequently went out into a yard at the back of the house. In about five minutes the prisoner came back hastily through the room in which Chapple was still sitting, having in his hand his belt which he had taken off. As the prisoner passed he aimed a blow with his belt at the said Horace Chapple, and struck him slightly. The belt bounded off and struck the prosecutrix, who was standing talking to the said Horace Chapple, in the face, cutting her face open and wounding her severely.

At the close of the case the learned Recorder left these questions to the jury: (1) Was the blow struck at Chapple in self-defense to get through the room, or unlawfully and maliciously? (2) Did the blow so struck in fact wound Ellen Rolston? (3) Was the striking of Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?

The jury found: (1) That the blow was unlawful and malicious. (2) That the blow did in fact wound Ellen Rolston. (3) That the

¹ See, for a learned and exhaustive opinion in accord, the opinion of Hoek, J., in *State v. Horton*, 139 N. C. 588, 51 S. E. 945, 1 L. R. A. (N. S.) 991, 111 Am. St. Rep. 818 (1905).

striking of Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected.

Upon these findings the learned Recorder directed a verdict of guilty to be entered to the first count, but respited judgment, and admitted the prisoner to bail, to come up for judgment at the next sessions.

The question for the consideration of the court was whether, upon the facts and the findings of the jury, the prisoner was rightly convicted of the offense for which he was indicted.

By St. 24 & 25 Vict. c. 100, § 20, it is enacted that:

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of misdemeanor."

Croft, for the prisoner. The findings of the jury amount to a verdict of not guilty, for, though they found that the blow was unlawful and malicious, and did in fact wound the prosecutrix, they negatived those findings by the finding that the blow was accidental. In *Reg. v. Pembliton*, 12 Cox, C. C. 607, 30 L. T. Rep. (N. S.) 405, L. R. 2 Cr. Cas. Res. 119, it was held that a jury, by finding that a stone had been thrown by the prisoner, intending to strike a person with whom he had been fighting, and not intending to break a window as he had done, had negatived the existence of malice, either actual or constructive, and a conviction for malicious injury to property was upon that ground quashed. [MANISTY, J. Suppose here the prisoner had killed Ellen Rolston, would not he have been guilty of manslaughter?] Yes; but in this case the indictment is under a statute which requires that the blow should have been given maliciously, and intention to wound the particular person is therefore necessary. [Lord ESHER. The indictment does not charge any specific intent. It charges that he did it unlawfully. He was doing a criminal and unlawful act, which resulted in a wounding of Ellen Rolston. Was not that an unlawful wounding?] No; in the case cited the words in the statute were the same, and it was held not to be an unlawful injury. [FIELD, J. There the indictment was that the prisoner unlawfully and maliciously injured the window of A., and the jury found that he intended to wound B., and no doubt the court would hold that the evidence did not support the indictment.] In *Reg. v. Faulkner*, 13 Cox, C. C. 550, a sailor entered a part of a vessel for the purpose of stealing rum, and accidentally fired the vessel, but he was nevertheless held not guilty of arson. [MANISTY, J. In that case there was no evidence at all of malice.] I submit that the unlawfulness of the act was sufficient evidence of malice there. In *McPherson v. Daniels*, 10 B. & C. 263, 2 M. & R. 251, "maliciously" has been defined as the doing a wrongful act willfully. [Lord COLERIDGE, C. J. Is not this case governed by the decision in *Reg. v. Hunt*, 1 Moo. C. C. 93?] No; for that case is inconsistent with the later case of *Reg. v. Hewlett*, 1 F. & F. 91, where it was held

that where a person strikes A., and B., interposing, receives the blow, a conviction for wounding B. with intent to do grievous bodily harm cannot be sustained. I submit that this case is governed by the decision in Reg. v. Pembliton, and that, the jury having negatived the existence of malice, the prisoner is entitled to an acquittal.

Helpman, for the prosecution, was not called upon.

LORD COLERIDGE, C. J. I am of opinion that this conviction must be sustained. In the first place, it is common knowledge that if a person has a malicious intent towards one person, and in carrying into effect that malicious intent he injures another man, he is guilty of what the law considers malice against the person so injured, because he is guilty of general malice, and is guilty if the result of his unlawful act be to injure a particular person. That would be the law if the case were *res integra*; but it is not *res integra*, because in Reg. v. Hunt a man, in attempting to injure A., stabbed the wrong man. There, in point of fact, he had no more intention of injuring B. than a man has an intent to injure a particular person who fires down a street where a number of persons are collected, and injures a person he never heard of before. But he had an intent to do an unlawful act, and in carrying out that intent he did injure a person; and the law says that, under such circumstances, a man is guilty of maliciously wounding the person actually wounded. That would be the ordinary state of the law if it had not been for the case of Reg. v. Pembliton. But I observe that, in such an indictment, as in that case, the words of the statute carry the case against the prisoner more clearly still, because, by St. 24 & 25 Vict. c. 100, § 18, it is enacted that "whosoever shall unlawfully and maliciously by any means whatsoever wound * * * any person * * * with intent * * * to maim, disfigure, or disable any person * * * shall be guilty of felony"; and then section 20 enacts that "whosoever shall unlawfully and maliciously wound * * * any other person shall be guilty of a misdemeanor," and be liable to certain punishments. Therefore the language of the eighteenth and twentieth sections are perfectly different; and it must be remembered that this is a conviction for an offense under the twentieth section. Now, the Master of the Rolls has pointed out that these very sections are in substitution for and correction of the earlier statute (St. 9 Geo. IV, c. 31), where it was necessary that the act should have been done with intent to maim, disfigure, or disable such person, showing that the intent must have been to injure the person actually injured. Those words are left out in the later statute, and the words are "wound any other person." I cannot see that there could be any question, but for the case of Reg. v. Pembliton. Now, I think that that case was properly decided, but upon a ground which renders it clearly distinguishable from the present case; that is to say, the statute which was under discussion in Reg. v. Pembliton makes an unlawful injury to property punishable in a certain way. In that case the jury and the facts

Intent

expressly negatived that there was any intent to injure any property at all; and the court held that, in a statute which created it an offense to injure property, there must be an intention to injure property in order to support an indictment under that statute. But for that case Mr. Croft is out of court, and I therefore think that this conviction should be sustained.¹

SECTION 4.—SPECIFIC INTENT.

REX v. DUFFIN.

(Court for Crown Cases Reserved, 1818. Russ. & R. 365.)

The prisoners were tried before Mr. Baron Wood, at the Surrey spring assizes, in the year 1818, on an indictment containing three counts.

The first count charged the prisoner with willfully, maliciously, and unlawfully assaulting John Sharp, and with a sharp instrument cutting him upon his forehead with intent to murder him, contrary to the form of the statute. The second count charged the intent to be to disable the said John Sharp; and the third count charged the intent to be to do the said John Sharp some grievous bodily harm.

The facts proved were that the prisoners went by night into the burial ground of Lambeth Church with intent to dig up graves and to take dead bodies. They went to the bonehouse, broke open the door, and took out two shovels. The prisoner, Marshall, then began digging up a grave, and had dug down to a coffin, during which time Duffin was standing at the end of the grave. The sexton, who with his son and another person, of the name of John Sharp, as his assistant, had been concealed in the churchyard with arms to watch the prisoners, whom they knew, came forward to the head of the grave, and said: "You scoundrels, don't you want some assistance there?" The prisoner Duffin said: "We are took to." Marshall got out of the grave and struck at the sexton with the shovel, but missed him. The sexton then said: "Will, don't you know me?" The prisoner Marshall said: "I know nobody." The sexton replied: "Surrender, or I'll shoot you." Marshall then struck a second blow, which the sexton parried off with his fowling piece. The sexton then struck Marshall with his fowling piece; and Marshall was again attempting to strike, but the sexton called out for assistance. The sexton's son came up, and fired a pistol over Marshall's head. Marshall then surrendered. Whilst Marshall was struggling with the sexton, Sharp,

¹ Concurring opinions of Esher, M. R., Bowen, L. J., and Field and Manisty, JJ., are omitted.

who was very near him, and who had not spoken, but had gone with the sexton for the purpose of apprehending anybody they should find disturbing the graves, received a blow from a sabre, which fell on his forehead. This cut was not very deep, nor in any wise dangerous, but bled very much. The blow from the saber was given by the prisoner Duffin, who attempted to strike Sharp a second time, but was knocked down by Sharp, and secured.

Curwood, for the prisoners, contended that what the prisoners had done was solely with a view to obstruct, resist, or prevent their own apprehension, and, as the statute had expressly provided for that case, the indictment ought to have been framed accordingly. He also contended that the statute applied only to cases of lawful apprehension; and here there was no lawful ground to warrant the apprehension of the prisoners, as the taking of dead bodies was not a felony, nor a breach of the peace, but merely a trespass.

Heath, for the Crown, contended that there was an intention on the part of the prisoners to do some grievous bodily harm to the prosecutor, independent of any resistance to their own apprehension.

The learned judge left that point to the jury, who found that the acts done by the prisoners were done with intent to obstruct, resist, and prevent their apprehension, and for no other purpose. The question of law the learned judge reserved for the opinion of the judges.

In Easter term, 1818, the judges met, and considered this case, and held the conviction wrong. The judges were of opinion that this case could not be within St. 43 Geo. III, c. 58, unless the apprehension of the prisoners would have been lawful, and if the cutting, etc., was to prevent a lawful apprehension, it should have been so stated, that being one of the intents mentioned in the act. The intent laid in the indictment had been expressly negatived by the jury, and therefore the conviction could not be supported.¹

REX v. HOLT.

(Shrewsbury Assizes, 1836. 7 Car. & P. 518.)

Shooting. The first count of the indictment against the prisoner was for feloniously, maliciously, and unlawfully shooting "at one John Hill," on the 23d of March, at Drayton in Hales, with intent to murder "the said John Hill"; second count, for the like, with intent to maim him; third, with intent to disfigure him; fourth, with intent to disable him; fifth, with the intent to do him some grievous bodily harm. The sixth, seventh, eighth, ninth, and tenth counts charged the shooting to have been "at the Rev. James Lee," with in-

¹ See, also, *Ogletree v. State*, 28 Ala. 693 (1856); *Roberts v. People*, 19 Mich. 401 (1870); *U. S. v. Buzzo*, 18 Wall. (U. S.) 125, 21 L. Ed. 812 (1873). Cf. *Rex v. Williams*, 1 Moo. 107 (1825).

tent to murder "the said Rev. James Lee," and with intent to maim him, etc., as in the former counts.¹

LITTLEDALE, J. (in summing up). If this had been a case of murder, and the prisoner, intending to murder one person, had by mistake murdered another, he would be equally liable to be found guilty. The question, however, may be different on the construction of this act of Parliament. There is no doubt that the prisoner shot at Mr. Hill, and that, if death had ensued, the offense would have amounted to murder; and then it will be for you to say whether the prisoner intended to do Mr. Hill some grievous bodily harm. It certainly appears that he did not so intend in point of fact. However, the law infers that a party intends to do that which is the immediate and necessary effect of the act which he commits.

The Foreman of the Jury: We find him guilty of shooting at Mr. Hill, with intent to do Mr. Lee some grievous bodily harm.

LITTLEDALE, J. There is no count for that. Do you find him guilty of shooting at Mr. Lee?

The Foreman of the Jury: No, my Lord; he fired at Mr. Hill intending to fire at Mr. Lee.

LITTLEDALE, J. Do you find that he intended to do harm to Mr. Hill?

The Foreman of the Jury: We find that he did not intend to do any harm to Mr. Hill.

LITTLEDALE, J. A verdict of not guilty must be recorded.

Verdict—Not guilty.²

REGINA v. DODDRIDGE.

(Devon Assizes, 1860. 8 Cox, C. C. 335.)

Prisoners were indicted for night poaching, and for assaulting the keepers.

Karslake & Young, for the prosecution.

Carter, for the prisoners.

It was proved that prisoners were seen by the keepers on the land of the prosecutor, at midnight, armed with guns, near a preserve of pheasants, and shots were heard. On seeing the keepers the prisoners made off through a plantation into an adjoining highway, where they sat down under a tree. The keepers then came up to them, when the prisoners assaulted and severely wounded them.

In answer to a question by the learned judge, the keepers said that they had not followed the prisoners into the highway with an intention to arrest them.

¹ Part of this case is omitted.

² Accord: *Reg. v. Ryan*, 2 Moo. & R. 212 (1839). Cf. *Reg. v. Stopford*, 11 Cox, C. C. 643 (1870); *Scott v. State*, 49 Ark. 156, 4 S. W. 750 (1886).

CHANNELL, B. This will not sustain the charge of assaulting. The assault must be committed at the time when the keepers are attempting to arrest the prisoners. Here they distinctly swear that they had no intention to arrest the prisoners when they came up to them in the public road. These counts cannot be sustained.

On the trial of another indictment against the same prisoners, before MARTIN, B., for wounding with intent, etc.

Karslake contended that evidence of a common intent to poach would sustain the charge of a joint unlawful wounding, so as to make the act of some of them the act of all.

Carter, contra.

MARTIN, B. I quite agree with my Brother CHANNELL that proof of a common intent to poach is no evidence whatever of a common intent to wound.

The jury acquitted the prisoners.

REGINA v. PEMBLITON.

(Court of Criminal Appeal, 1874. 12 Cox, C. C. 607.)

Lord COLERIDGE, C. J.¹ I am of opinion that this conviction must be quashed. The facts of the case are these: The prisoner and some other persons who had been drinking in a public house were turned out of it at about 11 p. m. for being disorderly, and they then began to fight in the street near the prosecutor's window. The prisoner separated himself from the others, and went to the other side of the street, and picked up a stone, and threw it at the persons he had been fighting with. The stone passed over their heads, and broke a large plate glass window in the prosecutor's house, doing damage to an amount exceeding £5. The jury found that the prisoner threw the stone at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window. The question is whether, under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor, the proof of these facts alone, coupled with the finding of the jury, will do? Now I think that is not enough. The indictment is framed under St. 24 & 25 Vict. c. 97, § 51. The act is an act relating to malicious injuries to property, and section 51 enacts that whosoever shall unlawfully and maliciously commit any damage, etc., to or upon any real or personal property whatsoever of a public or a private nature, for which no punishment is hereinbefore provided, to an amount exceeding £5, shall be guilty of a misdemeanor. There is also the fifty-eighth section, which deserves attention: "Every punishment and forfeiture by this act imposed on any person maliciously

¹ The opinion only is printed.

committing any offense, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offense shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." It seems to me, on both these sections, that what was intended to be provided against by the act is the willfully doing an unlawful act, and that the act must be willfully and intentionally done on the part of the person doing it to render him liable to be convicted. Without saying that, upon these facts, if the jury had found that the prisoner had been guilty of throwing the stone recklessly, knowing that there was a window near which it might probably hit, I should have been disposed to interfere with the conviction, yet as they have found that he threw the stone at the people he had been fighting with, intending to strike them, and not intending to break the window, I think the conviction must be quashed. I do not intend to throw any doubt on the cases which have been cited, and which show what is sufficient to constitute malice in the case of murder. They rest upon the principles of the common law, and have no application to a statutory offense created by an act in which the words are carefully studied.

BLACKBURN, J. I am of the same opinion, and I quite agree that it is not necessary to consider what constitutes willful malice aforethought to bring a case within the common-law crime of murder, when we are construing this statute, which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property to an amount exceeding £5 shall be guilty of a misdemeanor. A person may be said to act maliciously when he willfully does an unlawful act without lawful excuse. The question here is, can the prisoner be said, when he not only threw the stone unlawfully, but broke the window unintentionally, to have unlawfully and maliciously broken the window? I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if they had found that the prisoner was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury have not found that the prisoner threw the stone, knowing that, on the other side of the men he was throwing at, there was a glass window, and that he was reckless as to whether he did or did not break the window. On the contrary, they have found that he did not intend to break the window. I think, therefore, that the conviction must be quashed.

PICOTT, B. I am of the same opinion.

LUSH, J. I also think that on this finding of the jury we have no alternative but to hold that the conviction must be quashed. The word "maliciously" means an act done either actually or constructively with a malicious intention. The jury might have found that he

In all the cases, now or is essential at common law - but this is not binding on the Legislature. The Legislature could only act to amend, even in the absence of new law, but it is not the function of the Legislature to determine whether the statute should be valid in the light of the common law principle or not - it is for the courts to decide.

There is no uniformity in the decisions but there are common principles, fairly commonly accepted.

1. Police Regulations, such as for road laws, which, like a statute, are generally held not to require now or - for example, *Adams v. Lindsell* [1917] 1 KB 267.

2. Some do hold that where a statute prohibits an act, it is still, now or is not essential. *Ex p. 192* [1917] 1 KB 267.

3. *Atty. Gen. v. Maitland*, [1917] 1 KB 267.

The Court considers many things, including:

1. The implications of the language of the statute.
2. The character of the prohibition.
3. The kind of remedy of the penalty.
4. Consistency with other parts of the statute.
5. Consistency of holding all the way.
- 6.

did intend actually to break the window or constructively to do so, as that he knew that the stone might probably break it when he threw it. But they have not so found.

CLEASBY, B., concurred.

Conviction quashed.

SECTION 5.—INTENT IN STATUTORY CRIMES.

REGINA v. PRINCE.

(Court for Crown Cases Reserved, 1875. 13 Cox, C. C. 138.)

Case reserved for the opinion of the Court for the Consideration of Crown Cases Reserved by Denman, J.

At the Assizes for Surrey, held at Kingston-on-Thames on the 24th March last, Henry Prince was tried before me upon the charge of having unlawfully taken one Annie Phillips, an unmarried girl, being under the age of 16 years, out of the possession and against the will of her father. The indictment was framed under St. 24 & 25 Vict. c. 100, § 55.

He was found guilty, but judgment was respited in order that the opinion of the Court for Crown Cases Reserved might be taken upon the following case:

All the facts necessary to support a conviction existed, and were found by the jury to have existed, unless the following facts constitute a defense: The girl, Annie Phillips, though proved by her father to be 14 years old on the 6th April following, looked very much older than 16; and the jury found upon reasonable evidence that before the defendant took her away she had told him that she was 18, and that the defendant bona fide believed that statement, and that such belief was reasonable.

If the court is of opinion that under these circumstances a conviction was right, the defendant is to appear for judgment at the next Assizes for Surrey; otherwise the conviction is to be quashed. See *R. v. Robins*, 1 C. & K. 456; *R. v. Olifier*, 10 Cox, C. C. 402.

No counsel was instructed to argue on behalf of the prisoner.

The case came on in the court below on 24th April, and was directed to be argued before all the judges.¹

BRAMWELL, B., delivered the following judgment, to which the Lord Chief Baron KELLY, CLEASBY, B., GROVE, J., POLLOCK, B., and AMPHLETT, B., assented:

The question in the case depends on the construction of the statute

¹ Argument of counsel, concurring opinions of Blackburn, J., assented to by Cockburn, C. J., and Mellor, Lush, Quain, Archibald, Field, and Lindley, JJ., and of Denman, J., and dissenting opinion of Brett, J., are omitted.

under which the prisoner is indicted. That enacts that "whosoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession and against the will of her father, or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Now the word "unlawfully" means "not lawfully," "otherwise than lawfully," "without lawful cause"—such as would exist, for instance, on a taking by a police officer on a charge of felony, or a taking by a father of his child from her school. The statute, therefore, may be read thus: "Whosoever shall take, etc., without lawful cause." Now the prisoner had no such cause, and consequently, except in so far as it helps the construction of the statute, the word "unlawfully" may, in the present case, be left out; and then the question is, has the prisoner taken an unmarried girl under the age of 16 out of the possession of and against the will of her father? In fact he has; but it is said not within the meaning of the statute, and that that must be read as though the word "knowingly" or some equivalent word was in, and the reason given is that as a rule the mens rea is necessary to make any act a crime or offense, and that if the facts necessary to constitute an offense are not known to the alleged offender there can be no mens rea. I have used the word "knowingly," but it will perhaps be said that here the prisoner not only did not do the act knowingly, but knew, as he would have said or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under 16 or not, and will take the chance," but acted on the reasonable belief that she was over 16 and that though, if he had done what he did, knowing or believing neither way, but hazarding it, there would be a mens rea, there is not one when he believes he knows that she is over 16. It is impossible to suppose that a person taking a girl out of her father's possession against his will is guilty of no offense within the statute unless he, the taker, knows she is under 16—that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is whether he is guilty where he knows, as he thinks, that she is over 16. This introduces the necessity for reading the statute with some strange words introduced, as thus: "Whosoever shall take any unmarried girl, being under the age of 16, and not believing her to be over the age of 16, out of the possession," etc. Those words are not there, and the question is whether we are bound to construe the statute as though they were, on account of the rule that the mens rea is necessary to make an act a crime. I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself, if without lawful cause. I do not say illegal, but wrong. I have not lost sight of this: that, though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female, with a good motive. Nevertheless, though there may be cases which are not immoral in

one sense, I say that the act forbidden is wrong. Let us remember what is the case supposed by the statute. It supposes that there is a girl. It does not say a woman, but a girl, something between a child and a woman. It supposes she is in possession of her father, or mother, or other person having lawful care and charge of her; and it supposes there is a taking, and that that taking is against the will of the person in whose possession she is. It is, then, a taking of a girl in the possession of some one against his will. I say that done without lawful cause is wrong, and that the Legislature meant it should be at the risk of the taker, whether or no she was under 16. I do not say that taking of a woman of 50 from her brother's, or even father's, house is wrong. She is at an age when she has a right to choose for herself. She is not a girl, nor of such tender age that she can be said to be in the possession of or under the care or charge of any one. If I am asked where I draw the line, I answer at when the female is no longer a girl in any one's possession. But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, and can be said to be in another's possession, and in that other's care or charge. No argument is necessary to prove this. It is enough to state the case. The Legislature has enacted that, if any one does this wrong act, he does it at the risk of her turning out to be under 16. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*. So if he did not know she was in any one's possession, nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute—an act which, if he knew she was in possession and care or charge of any one, he would know was a crime or not, according as she was under 16 or not. He would know he was doing an act wrong itself, whatever was his intention, if done without lawful cause. In addition to these considerations, one may add that the statute does use the word "unlawfully," and does not use the words "knowingly or not believing to the contrary." If the question was whether his act was unlawful, there would be no difficulty, as it clearly was not lawful. This view of the section, to my mind, is much strengthened by a reference to other sections of the same statute. Section 50 makes it a felony to unlawfully and carnally know a girl under the age of 10. Section 51 enacts (when she is above 10 and under 12) to unlawfully and carnally know her is a misdemeanor. Can it be supposed, in the former case, a person indicted might claim to be acquitted on the ground that he had believed the girl was over 10, though under 12, and so that he had only committed a misdemeanor, or that he believed her over 12, and so had committed no offense at all, or that in a case under section 51 he could claim to be acquitted, because he believed her over 12? In both cases the act is intrinsically wrong; for the statute says, if "unlawfully" done. The act done with a *mens rea* is unlawfully and carnally knowing the girl, and the

man doing that act does it at the risk of the child being under the statutory age. It would be mischievous to hold otherwise. So section 56, by which whoever shall take away any child under 14, with intent to deprive parent or guardian of the possession of the child, or with intent to steal any article upon such child, shall be guilty of felony. Could a prisoner say, "I did take away the child to steal its clothes, but I believed it to be over 14?" If not, then neither could he say, "I did take the child with intent to deprive the parent of its possession, but I believed it over 14." Because, if words to that effect cannot be introduced into the statute where the intent is to steal the clothes, neither can they where the intent is to take the child out of the possession of the parent. But if these words cannot be introduced in section 56, why can they be in section 55? The same principle applies in these cases. A man is held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. *Reg. v. Forbes*, 10 Cox, C. C. 362. Why? Because the act was wrong in itself. So, also, in the case of burglary; could a person charged claim an acquittal on the ground that he believed it was past 6 a. m. when he entered, or in housebreaking that he did not know the place broken into was a house? As to the case of the marine stores, it was held properly that there was no *mens rea*, where the persons charged with the possession of naval stores with the admiralty mark did not know the stores he had bore the mark (*Reg. v. Sleep*, 8 Cox, C. C. 472, 30 L. J. 171, M. C.), because there is nothing prima facie wrong or immoral in having naval stores unless they are so marked. But suppose some one had told him there was a mark, and he had said he would chance whether or no it was the admiralty mark. So, in the case of the carrier with game in his possession, unless he knew he had it, there would be nothing done or permitted by him, no intentional act or omission. So, of the vitriol sender, there was nothing wrong in sending such packages as were sent, unless they contained vitriol. Take, also, the case of libel, where the publisher thought the occasion privileged, or that he had a defense under Lord Campbell's act, but was wrong. He would not be entitled to be acquitted, because there was no *mens rea*. Why? Because the act of publishing written defamation is wrong where there is no lawful cause. Further, there have been four decisions on this statute in favor of the construction I contend for. I say it is a question of construction of this particular statute, no doubt bringing thereto the common-law doctrine of *mens rea* being a necessary ingredient of crime. It seems to me impossible to say that where a person takes a girl out of her father's possession, not knowing whether she is or is not under 16, he is not guilty, and equally impossible when he believes, but erroneously, that she is old enough for him to do a wrong act with safety. I think the conviction should be affirmed.²

² Accord: *State v. Ruhl*, 8 Iowa, 447 (1859); *Riley v. State* (Miss.) 18 So. 117 (1896); carnally knowing a female under 16 years, *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496 (1895).

REGINA v. TOLSON.

(Court for Crown Cases Reserved, 1889. 23 Q. B. Div. 168.)

WILLS, J. In this case the prisoner was convicted of bigamy. She married a second time within seven years of the time when she last knew of her husband being alive, but upon information of his death, which the jury found that she upon reasonable grounds believed to be true. A few months after the second marriage he reappeared.

The statute upon which the indictment is framed is St. 24 & 25 Vict. c. 100, § 57, which is in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with penal servitude for not more than seven years, or imprisonment with or without hard labor for not more than two years"—with a proviso that "nothing in this act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time."

There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and when she did so he had not been continually absent from her for the space of seven years last past.

It is, however, undoubtedly a principle of English criminal law that, ordinarily speaking, a crime is not committed if the mind of the person doing the act in question be innocent. "It is a principle of natural justice and of our law," says Lord Kenyon, C. J., "that 'actus non facit reum, nisi mens sit rea.' The intent and act must both concur to constitute the crime." *Fowler v. Padgets*, 7 T. R. 509, 514. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may coexist with respect to the same deed. There are many things prohibited by no statute—fornication or seduction, for instance—which nevertheless no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong, in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of jus-

tice, and, indeed, the foundations of civil society, rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of the citizen.

Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. By-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thicknesses of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offense and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-law that the person committing it had bona fide made an accidental miscalculation or an erroneous measurement. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

Whether an enactment is to be construed in this sense, or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment and the various circumstances that may make the one construction or the other reasonable or unreasonable. There is no difference, for instance, in the kind of language used by acts of Parliament which made the unauthorized possession of government stores a crime, and the language used in by-laws which say that, if a man builds a house or a wall so as to encroach upon a space protected by the by-law from building, he shall be liable to a penalty. Yet in *Reg. v. Sleep*, L. & C. 44, 30 L. 5, (M. C.) 170, it was held that a person in possession of government stores with the broad arrow could not be convicted when there was not sufficient evidence to show that he knew they were so marked, whilst the mere infringement of a building by-law would entail liability to the penalty. There is no difference between the language by which it is said that a man shall sweep the snow from the pavement in front of his house before a given hour in the morning, and if he fail to do so shall pay a penalty, and that by which it is said that a man sending vitriol by railway shall mark the nature of the goods on the package on pain of forfeiting a sum of money; and yet I suppose that in the first case the penalty would attach if the thing were not done, whilst in the other case it has been held in *Hearne v. Garton*, 2 E. & E. 66, that where the sender had made reasonable inquiry, and was tricked into the belief that the goods were of an innocent character, he could not be convicted, although he had in fact sent the vitriol not properly marked. There is

no difference between the language by which it is enacted that "who-soever shall unlawfully and willfully kill any pigeon under such circumstances as shall not amount to a larceny at common law" shall be liable to a penalty, and the language by which it is enacted that "if any person shall commit any trespass by entering any land in the day-time in pursuit of game" he shall be liable to a penalty; and yet in the first case it has been held that his state of mind is material (*Taylor v. Newman*, 4 B. & S. 89) and in the second that it is immaterial (*Watkins v. Major*, Law Rep. 10 C. P. 666). So, again, there is no difference in the language between the enactments I have referred to, in which the absence of a guilty mind was held to be a defense, and that of the statute which says that "any person who shall receive two or more lunatics" into any unlicensed house shall be guilty of misdemeanor, under which the contrary has been held (*Reg. v. Bishop*, Q. B. D. 259). A statute provided that any clerk to justices who should, under color and pretense of anything done by the justice or the clerk, receive a fee greater than that provided for by a certain table, should for every such offense forfeit £20. It was held that where a clerk to justices bona fide and reasonably, but erroneously, believed that there were two sureties bound in a recognizance besides the principal, and accordingly took a fee as for three recognizances, when he was only entitled to charge for two, no action would lie for the penalty. "Actus," says Lord Campbell, "non facit reum, nisi mens sit rea. Here the defendant, very reasonably believing that there were two sureties bound, beside the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture. The language of the statute is 'for every such offense.' If, therefore, the table allowed him to charge for three recognizances, where there are a principal and two sureties, he has not committed an offense under the act." *Bowman v. Blyth*, 7 E. & B. 26, 43.

If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there is, and sometimes that there is not, an offense when the guilty mind is absent, it is obvious that assistance must be sought aliunde, and that all circumstances must be taken into consideration which tend to show that the one construction or the other is reasonable, and amongst such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight if the words be incapable of more than one construction; but I have, I think, abundantly shown that there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offense entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken into account. In a case in which a woman was indicted under St. 9 & 10 Wm. III, c. 41, § 2, for having in her possession without

a certificate from the proper authority government stores marked in the manner described in the act, it was argued that by the act the possession of the certificate was made the sole excuse, and that as she had no certificates she must be convicted. Foster, J., said, however, that though the words of the statute seemed to exclude any other excuse, yet the circumstances must be taken into consideration, otherwise a law calculated for wise purposes might be made a handmaid to oppression, and directed the jury that, if they thought the defendant came into possession of the stores without any fraud or misbehavior on her part, they ought to acquit her. Fost. C. L. (3d Ed.) App. pp. 439, 440. This ruling was adopted by Lord Kenyon in *Rex v. Banks*, 1 Esp. 144, who considered it beyond question that the defendant might excuse himself by showing that he came innocently into such possession, and treated the unqualified words of the statute as merely shifting the burden of proof, and making it necessary for the defendant to show matter of excuse, and to negative the guilty mind, instead of its being necessary for the crown to show the existence of the guilty mind. Prima facie the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned. Suppose a man had taken up by mistake one of two baskets exactly alike and of similar weight, one of which contained innocent articles belonging to himself and the other marked government stores, and was caught with the wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet what defense could there be, except that his mind was innocent, and that he had not intended to do the thing forbidden by the statute? In *Fowler v. Padget*, 7 T. R. 509, the question was whether it was an act of bankruptcy for a man to depart from his dwelling house, whereby his creditors were defeated and delayed, although he had no intention of defeating and delaying them. The statute which constituted the act of bankruptcy was St. 1 Jac. I, c. 15, which makes it an act of bankruptcy (amongst other things) for a man to depart his dwelling house "to the intent or whereby his creditors may be defeated and delayed." The Court of King's Bench, consisting of Lord Kenyon, C. J., and Ashurst and Grose, JJ., held that there was no act of bankruptcy. "Bankruptcy," said Lord Kenyon, "is considered as a crime, and the bankrupt in the old laws is called an offender; but," he adds in the passage already cited, "it is a principle of natural justice and of our law that *actus non facit reum, nisi mens sit rea*," and the court went so far as to read "and" in the statute, in place of "or," which is the word used in the act, in order to avoid the consequences which appeared to them unjust and unreasonable. In *Rex v. Banks*, 1 Esp. 144, above cited, Lord Kenyon referred to Foster, J.'s, ruling in this case as that of "one of the best crown lawyers that ever sat in Westminster Hall." These decisions of Foster, J., and Lord Kenyon

have been repeatedly acted upon. See *Reg. v. Willmette*, 3 Cox, C. C. 281; *Reg. v. Cohen*, 8 Cox, C. C. 41; *Reg. v. Sleep* (in the Court for C. C. R.) L. & C. 44; *Reg. v. O'Brien*, 15 L. T. (N. S.) 419.

Now in the present instance one consequence of holding that the offense is complete if the husband or wife is de facto alive at the time of the second marriage, although the defendant had at the time of the second marriage every reason to believe the contrary, would be that, though the evidence of death should be sufficient to induce the Court of Probate to grant probate of the will or administration of the goods of the man supposed to be dead, or to prevail with the jury upon an action by the heir to recover possession of his real property, the wife of the person supposed to be dead, who had married 6 years and 11 months after the last time that she had known him to be alive would be guilty of felony in case he should turn up 20 years afterwards. It would be scarcely less unreasonable to enact that those who had in the meantime distributed his personal estate should be guilty of larceny. It seems to me to be a case to which it would not be improper to apply the language of Lord Kenyon, when dealing with a statute which, literally interpreted, led to what he considered an equally preposterous result: "I would adopt any construction of the statute that the words will bear in order to avoid such monstrous consequences." *Fowler v. Padget*, 7 T. R. 509.

Again, the nature and extent of the penalty attached to the offense may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the act of 24 & 25 Vict., to the loss of civil rights, to imprisonment with hard labor, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally, as well as unintentionally done something prohibited by law. I am well aware that the mischiefs which may result from bigamous marriages, however innocently contracted, are great; but I cannot think that the appropriate way of preventing them is to expose to the danger of a cruel injustice persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a Court of Probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death. It is, as it seems to me, undesirable in the highest degree without necessity to multiply instances in which people shall be liable to conviction upon very grave charges when the circumstances are such that no judge in the kingdom would think of pronouncing more than a nominal sentence.

It is said, however, in respect to the offense now under discussion,

that the proviso in St. 24 & 25 Vict. c. 100, § 57, that "nothing in the section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for seven years last past, and shall not have been known by such person to be living within that time," points out the sole excuse of which the act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies one particular case, and indicates what in that case shall be sufficient to exempt the party without any further inquiry from criminal liability; and I think it is an argument of considerable weight, in this connection, that under St. 9 & 10 Wm. III, c. 41, § 2, where a similar contention was founded upon the specification of one particular circumstance under which the possession of government stores should be justified, successive judges and courts have refused to accede to the reasoning, and have treated it, to use the words of Lord Kenyon, as a matter that "could not bear a question" that the defendant might show in other ways that his possession was without fraud or misbehavior on his part. *Rex v. Banks*.

Upon the point in question there are conflicting decisions. It was held by Martin, B., in *Reg. v. Turner*, 9 Cox, C. C. 145, and by Cleasby, B., in *Reg. v. Horton*, 11 Cox, C. C. 670, that bona fide belief, at the time of the second marriage, upon reasonable grounds, that the first husband or wife was dead, was a defense. In *Reg. v. Gibbons*, 12 Cox, C. C. 237, it is said that it was held by Brett, J., after consulting Willes, J., that such a belief was no defense. The report, however, is most unsatisfactory, as, if the facts were as there stated, there was no reasonable evidence of such belief upon any reasonable grounds, and in *Reg. v. Prince*, L. R. 2 C. C. R. 154, Brett, J., gave a very elaborate judgment containing his matured and considered opinion upon a similar question, which it is quite impossible to reconcile with the supposed ruling in *Reg. v. Gibbons*.

In *Reg. v. Bennett*, 14 Cox, C. C. 45, Bramwell, L. J., is reported to have followed *Reg. v. Gibbons*, and to have said that he had always refused to act upon *Reg. v. Turner*. But here again the report is eminently unsatisfactory, for it proceeds to state that the prisoner was convicted of two other offenses, forgery and obtaining money by false pretenses, and sentenced to ten years' penal servitude, which is a greater sentence than he could have received for bigamy. Except for the purpose of bringing out the sort of man that the prisoner was, and so emphasizing the fact that he deserved condign punishment, the bigamy trial might have been omitted.

In *Reg. v. Moore*, 13 Cox, C. C. 544, Denman, J., after consultation with Amphlett, L. J., directed the acquittal of a woman charged with bigamy, the jury having found that, although seven years had not elapsed since she last knew that her husband was living, she had, when she married a second time, a reasonable and bona fide belief that he was dead, saying that in his opinion and that of Amphlett, L. J., such

a belief was a defense. He added, however, that his opinion was not to be taken as a final one, and that, had the circumstances been such that the prisoner would, if the conviction could be sustained, have deserved a substantial sentence, he should have directed a conviction, and reserved the question.

There is nothing, therefore, in the state of the authorities directly bearing upon the question to prevent one from deciding it upon the grounds of principle. It is suggested, however, that the important decision of the court of 15 judges in *Reg. v. Prince* is an authority in favor of a conviction in this case. I do not think so. In *Reg. v. Prince* the prisoner was indicted under St. 24 & 25 Vict. c. 100, § 55, for "unlawfully taking an unmarried girl, then being under the age of sixteen years, out of the possession and against the will of her father." The jury found that the prisoner bona fide believed upon reasonable grounds that she was 18. The court (dissentiente Brett, J.) upheld the conviction. Two judgments were delivered by a majority of the court, in each of which several judges concurred, whilst three of them, Denman, J., Pollock, B., and Quain, J., concurred in both. The first of the two, being the judgment of nine judges, upheld the conviction upon the ground that, looking to the subject-matter of the enactment, to the group of sections amongst which it is found, and to the history of legislation on the subject, the intention of the Legislature was that, if a man took an unmarried girl under 16 out of the possession of her father against his will, he must take his chance of whether any belief he might have about her age was right or wrong, and if he made a mistake upon this point so much the worse for him; he must bear the consequences. The second of the two judgments, being that of seven judges, gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the Legislature as illustrated by other associated sections of the same act. This judgment contains an emphatic recognition of the doctrine of the "guilty mind" as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be 18 and not 16, even then, in taking her out of the possession of the father against his will, was doing an act wrong in itself. "This opinion," says the judgment, "gives full scope to the doctrine of the *mens rea*."

The case of *Reg. v. Prince*, therefore, is a direct and cogent authority for saying that the intention of the Legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind, preponderate greatly over any that point to its exclusion.

In my opinion, therefore, this conviction ought to be quashed. My

Brother CHARLES authorizes me to say that this judgment expresses his views as well as my own.¹

MANISTY, J. I am of opinion that the conviction should be affirmed.

The question is whether, if a married woman marries another man during the life of her former husband and within seven years of his leaving her, she is guilty of felony; the jury having found as a fact that she had reason to believe and did honestly believe that her former husband was dead.

The fifty-seventh section of St. 24 & 25 Vict. c. 100, is as express and as free from ambiguity as words can make it. The statute says: "Whosoever being married shall marry any other person during the life of the former husband or wife * * * shall be guilty of felony, and being convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor." The statute does not even say, if the accused shall feloniously or unlawfully or knowingly commit the act, he or she shall be guilty of felony; but the enactment is couched in the clearest language that could be used to prohibit the act and to make it a felony if the act is committed.

If any doubt could be entertained on the point, it seems to me the proviso which follows the enactment ought to remove it. The proviso is that "nothing in the fifty-seventh section of the act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person to be living within that time."

Such being the plain language of the act, it is, in my opinion, the imperative duty of the court to give effect to it, and to leave it to the Legislature to alter the law if it thinks it ought to be altered.

Probably, if the law was altered, some provision would be made in favor of children of the second marriage. If the second marriage is to be deemed to be legal for one purpose, surely it ought to be deemed legal as to the children who are the offspring of it. If it be within the province of the court to consider the reasons which induced the Legislature to pass the act as it is, it seems to me one principal reason is on the surface, namely, the consequence of a married person marrying again in the lifetime of his or her former wife or husband, in which case it might, and in many cases would, be that several children of the second marriage would be born, and all would be bastards. The proviso is evidently founded upon the assumption that, after the lapse of seven years and the former husband or wife not being heard of, it may reasonably be inferred that he or she is dead, and thus the mis-

¹ Part of this opinion, and the concurring opinions of Cave, Stephen, and Hawkins, J.J., and Coleridge, C. J., and dissenting opinion of Denman, J., are omitted.

chief of a second marriage in the lifetime of the former husband or wife is to a great extent, if not altogether, avoided.

It is to be borne in mind that bigamy never was a crime at common law. It has been the subject of several acts of Parliament, and is now governed by St. 24 & 25 Vict. c. 100, § 57.

No doubt, in construing a statute, the intention of the Legislature is what the court has to ascertain; but the intention must be collected from the language used, and where that language is plain and explicit and free from all ambiguity, as it is in the present case, I have always understood that it is the imperative duty of judges to give effect to it.

The cases of insanity, etc., on which reliance is placed, stand on a totally different principle, viz., that of an absence of mens. Ignorance of the law is no excuse for the violation of it, and, if a person choose to run the risk of committing a felony, he or she must take the consequences, if it turn out that a felony has been committed.

Great stress is laid by those who hold that the conviction should be quashed upon the circumstance that the crime of bigamy is by the statute declared to be a felony, and punishable with penal servitude or imprisonment with or without hard labor for any term not exceeding two years. If the crime had been declared to be a misdemeanor, punishable with fine or imprisonment, surely the construction of the statute would have been, or ought to have been, the same. It may well be that the Legislature declared it to be a felony to deter married persons from running the risk of committing the crime of bigamy, and in order that a severe punishment might be inflicted in cases where there were no mitigating circumstances. No doubt circumstances may and do affect the sentence, even to the extent of the punishment being nominal, as it was in the present case; but that is a very different thing from disregarding and contravening the plain words of the act of Parliament.

The case is put by some of my learned Brothers of a married man leaving his wife and going into a foreign country, intending to settle there, and, it may be, afterwards to send for his wife and children, and the ship in which he goes is lost in a storm, with, as is supposed, all on board, and after the lapse of say a year, and no tidings received of any one having been saved, the underwriters pay the insurance on the ship, and the supposed widow gets probate of her husband's will, and marries, and has children, and after the lapse of several years the husband appears, it may be a few days before seven years have expired, and the question is asked, would it not be shocking that in such a case the wife could be found guilty of bigamy?

My answer is that the act of Parliament says in clear and express words, for very good reasons, as I have already pointed out, that she is guilty of bigamy. The only shocking fact would be that some one for some purpose of his own had instituted the prosecution. I need not say that no public prosecutor would ever think of doing so, and the judge before whom the case came on for trial would, as my Brother

Stephen did in the present case, pass a nominal sentence of a day's imprisonment (which in effect is immediate discharge), accompanied, if I were the judge, with a disallowance of the costs of the prosecution. It may be said: But the woman is put to some trouble and expense in appearing before the magistrate, who would, of course, take nominal bail, and in appearing to take her trial. Be it so; but such a case would be very rare indeed. On the other hand, see what a door would be opened to collusion and mischief, if, in the vast number of cases where men in humble life leave their wives and go abroad, it would be a good defense for a woman to say, and give proof which the jury believed, that she had been informed by some person upon whom she honestly thought she had reason to rely, and did believe, that her husband was dead, whereas in fact she had been imposed upon, and her husband was alive.

What operates strongly on my mind is this: that if the Legislature intended to prohibit a second marriage in the lifetime of a former husband or wife, and to make it a crime, subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the fifty-seventh section of the act in question. In this view I am fortified by several sections of the same act, where the words "unlawfully" and "maliciously and unlawfully" are used (as in section 23), and by a comparison of them with the section in question (section 57), where no such words are to be found. I especially rely upon the fifty-fifth section, by which it is enacted that "whosoever shall unlawfully" (a word not used in section 57) "take or cause to be taken any unmarried girl being under the age of sixteen years out of the possession of her father or mother or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Fifteen out of 16 judges held in the case of *Reg. v. Prince*, Law Rep. 2 C. C. R. 154, that, notwithstanding the use of the word "unlawfully," the fact of the prisoner believing and having reason to believe that the girl was over 16 afforded no defense. This decision is approved of upon the present occasion by 5 judges, making in all 20, against the 9 who are in favor of quashing the conviction. To the 20 I may, I think, fairly add *Tindal, C. J.*, in *Reg. v. Robins*, 1 C. & K. 456, and *Willes, J.*, in *Reg. v. Mycock*, 12 Cox, C. C. 28.

I rely, also, very much upon the fifth section of the act passed in 1885 for the better protection of women and girls (St. 48 & 49 Vict. c. 69), by which it was enacted that "any person who unlawfully and carnally knows any girl above thirteen and under sixteen years shall be guilty of a misdemeanor." But to that is added a proviso that "it shall be a sufficient defense if it be made to appear to the court or jury before whom the charge shall be brought that the person charged had reasonable cause to believe and did believe that the girl was of or above the age of 16." It is to be observed that, notwithstanding the word "unlawfully" appears in this section, it was considered necessary

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to add the proviso, without which it would have been no defense that the accused had reasonable cause to believe and did believe that the girl was of or above the age of 16. Those who hold that the conviction in the present case should be quashed really import into the fifty-seventh section of St. 24 & 25 Vict. c. 100, the proviso which is in the fifth section of St. 48 & 49 Vict. c. 69, contrary, as it seems to me, to the decision in *Reg. v. Prince*, Law Rep. 2 C. C. R. 154, and to the hitherto undisputed canons for construing a statute.

I think the conviction should be affirmed. My Brothers DENMAN, POLLOCK, FIELD, and HUDDLESTON agree with this judgment; but my Brother DENMAN has written a short opinion of his own, with which my Brother FIELD agrees.

Conviction quashed.²

STATE v. RIPPETH.

(Supreme Court of Ohio, 1904. 71 Ohio St. 85, 72 N. E. 298.)

One Rippeth was convicted of selling oleomargarine in imitation of butter, and on error the judgment of conviction was set aside in the circuit court, and the state brings error.

The defendant in error was charged, by affidavit filed with P. A. Garver, a justice of the peace in and for Franklin township, Tuscarawas county, with having unlawfully sold and delivered to one Martin Cowen oleomargarine to the amount of one pound, which oleomargarine then and there contained artificial (yellow) coloring matter, the

² Accord: *Adultery*, *Banks v. State*, 96 Ala. 78, 11 South. 404 (1891).

Selling liquor to minors, *People v. Welch*, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385 (1888). [Contra: *State v. Hartfiel*, 24 Wis. 60 (1869); *Farmer v. People*, 77 Ill. 322 (1875); *State v. Cain*, 9 W. Va. 559 (1876); *Commonwealth v. Finnegan*, 124 Mass. 324 (1878); *Redmond v. State*, 36 Ark. 58, 38 Am. Rep. 24 (1880); *State v. Sasse*, 6 S. D. 212, 60 N. W. 853, 55 Am. St. Rep. 834 (1894); *In re Carlson's License*, 127 Pa. 330, 18 Atl. 8 (1889).] *Selling liquor to habitual drunkards*, *Williams v. State*, 48 Ind. 306 (1874); *Crabtree v. State*, 30 Ohio St. 382 (1876); *Smith v. State*, 55 Ala. 1 (1876). [Contra: *Barnes v. State*, 19 Conn. 398 (1849); *State v. Heck*, 23 Minn. 549 (1877).] *Having in possession counterfeiting tools*, *People v. White*, 34 Cal. 188 (1867). *Illegal voting by person under 21 years*, *Gordon v. State*, 52 Ala. 308, 23 Am. Rep. 575 (1875). *Permitting growth of Canada thistles*, *Story v. People*, 79 Ill. App. 562 (1898). Contra: *Bigamy*, *Commonwealth v. Mash*, 7 Mete. (Mass.) 472 (1844); *Davis v. Commonwealth*, 13 Bush (Ky.) 318 (1877); *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800 (1896). *Adultery*, *State v. Goodenow*, 65 Me. 30 (1876); *People v. Hartman*, 130 Cal. 487, 62 Pac. 823 (1900). *Allowing minors to loiter on premises*, *State v. Kinkead*, 57 Conn. 173, 17 Atl. 855 (1889). *Selling adulterated food*, *Commonwealth v. Farren*, 91 Mass. 489 (1864); *State v. Smith*, 10 R. I. 258 (1872); *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795 (1887); *State v. Newton*, 50 N. J. Law, 534, 14 Atl. 604 (1888); *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163 (1896). *Selling intoxicating liquor*, *King v. State*, 66 Miss. 502, 6 South. 188 (1889); *Commonwealth v. O'Kean*, 152 Mass. 584, 26 N. E. 97 (1891). *Having in possession adulterated tobacco*, *Reg. v. Woodrow*, 15 M. & W. 404 (1846). *Selling vinegar below standard*, *People v. Grocer Co.*, 118 Mich. 604, 77 N. W. 315 (1898). *Removing timber from school lands*, *State v. Dorman*, 9 S. D. 528, 70 N. W. 848 (1897).

name of which coloring matter was unknown to the affiant, contrary to statute in such case made and provided, etc. On this affidavit the defendant was put upon trial to a jury of 12 men. The purchaser of the said oleomargarine, Martin Cowen, is an inspector in the dairy and food department of the state of Ohio, and it appeared upon the trial that on the 17th day of January, 1901, the said Martin Cowen entered the grocery of the defendant in error, presented his card, which contained his name, address, and official capacity, then and there stating to said defendant in error that he was a state food inspector, and that he desired to see his oleomargarine. The defendant in error took said Cowen around his counter and showed him the oleomargarine, which was done up in pound packages. Cowen said to Rippeth, "I would like to have a pound of this oleomargarine for analysis," whereupon Rippeth said, "All right," and delivered the oleomargarine, and accepted the market price therefor. The same was taken to a chemist—Prof. Hobbs—and was analyzed by him, and proved to contain coloring matter. At the close of the testimony offered by the state the defendant made a motion to the justice to direct a verdict in his behalf. The court overruled this motion, and, no evidence being offered by the defense, the case was argued by counsel, and after a charge by the court was submitted to the jury, who returned a verdict of guilty. Motion to set aside the verdict was filed by the defendant, and overruled by the justice. A bill of exceptions was prepared, signed, and allowed, and proceedings in error prosecuted in the court of common pleas, where the judgment of the justice of the peace was affirmed. On petition in error in the circuit court the judgment of the court of common pleas was reversed, and this proceeding in error is prosecuted to reverse the judgment of the circuit court and affirm the judgment of the court of common pleas.

PER CURIAM. Section 4200-16, Bates' Ann. St., makes it a penal offense for any person to "sell or deliver" any oleomargarine which contains coloring matter. This is a police regulation, imposing a penalty irrespective of criminal intent; and it contains no exception in favor of any person, nor as to whom the prohibited article may be sold or delivered, nor for what purpose. The dealer in the adulterated article has it in his possession for sale, and sells or delivers the same at his peril. He cannot shield himself by the plea of ignorance in regard to its character, nor by the plea that he made the sale for analysis, or for any other purpose. *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163; *State v. Hutchinson*, 56 Ohio St. 82, 46 N. E. 71.

Judgment of the circuit court reversed, and judgment of the court of common pleas affirmed.

OSCAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

CRAW, J. (dissenting).¹ I cannot concur in the conclusion reached by a majority of the court that the judgment of conviction in this

¹ Part of this opinion is omitted.

case was right and should be affirmed. Section 4200-16, Bates' Ann St., provides that "no person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methly [methyl], orange, butter yellow, annato, analine dye, or any other coloring matter." Section 4200-7 provides that "every person manufacturing, offering or exposing for sale, or delivering to a purchaser, any drug or article of food included in the provisions of this act, shall furnish to any person interested, or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession." And by section 4200-8 it is provided that "whoever refuses to comply, upon demand, with the requirements of section 4 (section 4200-7), and whoever violates any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars nor less than twenty-five dollars, or imprisoned not exceeding one hundred nor less than thirty days, or both." It will be observed that above section 4200-7 is not merely directory, but is in terms peremptory and mandatory, and a failure to comply with its provisions is by section 4200-8 made a misdemeanor punishable by fine or imprisonment, or both. If, then, the sample of oleomargarine furnished and delivered by Rippeth to the inspector, Cowen, on his demand, and for the purpose of analysis, was oleomargarine which Rippeth was "offering or exposing for sale," then such furnishing and delivery by Rippeth was, by force of the provisions of section 4200-7, made compulsory, and such furnishing would not, therefore, in legal intendment, amount to or constitute a sale, inasmuch as in such transaction one of the essential elements of the contract of sale is wanting, viz., the voluntary assent of the seller. Furthermore, section 4200-7, as we have seen, peremptorily commands and requires a dealer in oleomargarine to furnish to the inspector, or any person demanding the same, on demand and tender of the price, a sample of such oleomargarine for the purpose of analysis, and a penalty is provided for his refusal so to do. So that what was done by Rippeth in this case in the matter of furnishing or delivering to Cowen, the inspector, this sample of oleomargarine was that only which the statute itself commanded and required him to do in that behalf, and such furnishing by him was, therefore, a compliance with and an obedience of the positive mandate of the statute, rather than a transgression or violation of its provisions and requirements, and was, therefore, not unlawful. The statute having made the furnishing of a sample, for the purpose of analysis, obligatory and compulsory, a furnishing for such purpose is not a crime, and cannot rightfully be made a predicate for the criminal prosecution of the person so furnishing said sample.

SECTION 6.—CONCURRENCE OF SEVERAL INTENTS.

REX v. WILLIAMS.

(King's Bench, 1795. 1 Leach, 529.)

Mr. Justice ASHURST.¹ Rhenwick Williams, the prisoner at the bar, was tried in the last July session on St. 6 Geo. I, c. 23. And the indictment charged that he, on the 18th January, 1790, at the parish of St. James, in a certain public street called "St. James' Street," willfully, maliciously, and feloniously did make an assault on Anne Porter, spinster, with intent willfully and maliciously to tear, spoil, cut, and deface her garments, and that he, on that said 18th of January, 1790, in the parish aforesaid, etc., did willfully, maliciously, and feloniously tear, spoil, cut, and deface her silk gown, petticoat, and shift, being part of the wearing apparel which she then had and wore on her person. The jury found the prisoner guilty; but the judgment was respited, and the case submitted to the consideration of the judges upon three questions.

The judges are of opinion that the case, as proved, is not substantially within the meaning of the act of Parliament. This statute was passed upon a particular and extraordinary occasion. Upon the introduction of Indian fashions into this country, the silk weavers, conceiving that it would be detrimental to their manufacture, made it a practice to tear and destroy the clothes and garments which were of a different commodity from that which they wove, and to prevent this practice St. 6 Geo. I, c. 23, was made. To bring a case, therefore, within this statute, the primary intention must be the tearing, spoiling, cutting, or defacing of the clothes; whereas, in the present case, the primary intention of the prisoner appears to have been the wounding of the person of the prosecutrix. The Legislature, at the time they passed this act, did not look forward to the possibility of a crime of so diabolical a nature as that of wounding an unoffending person merely for the sake of wounding the person, without having received any provocation whatever from the party wounded. But, even upon the supposition that it was possible for the Legislature to entertain an idea of such an offense, it is clear they did not intend to include it within the penalties of this statute, because, if they had entertained such an idea, it is probable they would have annexed to it a higher punishment than this statute inflicts. As the Legislature, therefore, could not have framed this statute to meet this offense, it does not fall within the province of those who are to expound the laws to usurp the office of the Legislature, and to bring an offense

¹ Part of this case is omitted.

within the meaning of an act merely because it is enormous and deserving of the highest punishment. But, although the lash of the Legislature does not reach this offense, so as to inflict the consequences of felony on the offender, yet the wisdom of the common law opens a means of prosecution by indictment for the misdemeanor, and, on conviction of the offender, arms the court with a power to punish the offense in a way that may force him to repent the temerity of so flagrant a violation of the rules of law, the precepts of social duty, and the feelings of humanity.²

REX v. GILLOW.

(Court for Crown Cases Reserved, 1825. 1 Moody, 85.)

The prisoner was tried and convicted before Mr. Justice Bayley, at the Lancaster Lent Assizes, in the year 1825, of maliciously shooting at Dennis Carter, with intent to do him some grievous bodily harm. It appeared that the prisoner had just come out of a wood, armed with a gun, illegally to kill game there, between 2 and 3 o'clock on the morning of the 2d November, 1824. He was skirting the wood to kill game there, when three keepers, who were upon the watch for poachers, suddenly sprung up, and were rushing forward to seize him, when the prisoner fired his gun at one of the keepers, and hit him upon the lower part of his back and buttocks.

The wound was not dangerous.

The jury were of opinion that the prisoner's motive was to prevent his lawful apprehension, but that in order to effect that purpose he had also the intention of doing to Carter some grievous bodily harm.

It was objected that, the act having specified the intent to prevent lawful apprehension, as one of the intents made essential to consti-

² It seems that Mr. Justice Buller, at the subsequent consultation of the judges, retained the opinion he had given to the jury, viz., that the case came within the statute, because the jury, whose sole province it was to find the intent, had expressly found that the intent of the prisoner was to wound the party by cutting through her clothes, and therefore that he must have intended to cut her clothes; and for this opinion he relied upon the Case of Cook and Woodburn, upon St. 22 & 23 Car. II, c. 1, commonly called the "Coventry Act," charging them in the words of the act with an intention to maim a Mr. Crisp. The fact of maiming was clearly proved, but the defendants insisted that their intention was to murder him, and not to maim him, and therefore that they were not within the statute. But Lord King said that the intention was a matter of fact to be collected from the circumstances of the case, and as such was proper to be left to the jury, and that, if it was the intent of the prisoners to murder, it was to be considered whether the means made use of to accomplish that end and the consequences of those means were not likewise in their intention and design; and the jury found them guilty and they were executed. But it seems that upon a subsequent occasion Willes, J., and Eyre, B., expressed some dissatisfaction with this determination, and thought, at least, that the construction ought not to be carried further. 1 East, 400, 424. See *People v. Cottrel*, 18 Johns. (N. Y.) 115 (1820).

tute the offense, and that being the main and principal intent in this case, the indictment should have charged that as the intent. The learned judge was of opinion that, if both intents existed, the question which was the principal and which was the subordinate intention was immaterial; but, though the learned judge did not reserve the point, he thought it right to submit the case to the consideration of the judges. In Easter term, 1825, the judges (BEST, L. C. J., and LITTLEDALE, J., absent) met and considered this case, and held that, if both intents existed, it was immaterial which was the principal and which the subordinate one, and that the conviction was therefore proper.¹

¹ Accord: *Rex v. Shadbolt*, 5 Car. & P. 504 (1833); *State v. Mitchell*, 27 N. C. 350 (1845); *People v. Carmichael*, 5 Mich. 10, 71 Am. Dec. 769 (1858); *State v. Clark*, 69 Iowa, 196, 28 N. W. 537 (1886).

CHAPTER IV.

NEGLIGENCE AS SUPPLYING INTENT.

Touching the sin of homicide, appeals are made thus: Knotting, who is here, appeals Carling, who is there, for that whereas Cadi, the father (brother, son, or uncle) of this Knotting * * * was struck on such a part of his body by a curable stroke (or had such a curable disease or wound), for the cure whereof he had placed himself under this Carling, who professed himself a master of medical practice, there came this Carling, and undertook the case, and by his folly and negligence, etc., feloniously slew him. Or thus: withdrew sustenance from him, whereby on such a day, etc., he slew him. Or thus: so long delayed his delivery [from prison] that thereby he slew him.

Mirror of Justices (Sel. Soc.) c. 15.

HULL'S CASE.

(Old Bailey, 1664. Kelyng, 40.)

In the Sessions in the Old Bailey holden the 13th of January, 1664, one John Hull was indicted for the murder of Henry Cambridge, and upon the evidence, the case was, that there were several workmen about building of a house by the Horse Ferry, which house stood about thirty feet from any highway or common passage, and Hull being a master workman (about evening when the master workman had given over work, and when the laborers were putting up their tools), was sent by his master to bring from the house a piece of timber which lay two stories high, and he went up for that piece of timber, and before he threw it down, he cried out aloud, stand clear, and was heard by the laborers, and all of them went from the danger but only Cambridge, and the piece of timber fell upon him and killed him; and my Lord Chief Justice Hyde held this to be manslaughter, for he said he should have let it down by a rope, or else at his peril, be sure nobody is there; but my Brother Wylde and myself held it to be misadventure, he doing nothing but what is usual for workmen to do; and before he did it, crying out aloud, stand clear, and so gave notice if there were any near they might avoid it; and we put the case; a man lopping a tree, and when the arms of the tree were ready to fall, calls out to them below, take heed,

and then the arms of the tree fall and kill a man, this is misadventure; and we showed him *Poulton de pace* 120, where the case is put, and the book cited, and held to be misadventure; and we said this case in question is much stronger than the case where one throws a stone or shoots an arrow over the wall or house, with which one is slain, this in *Kelloway* 108 and 136, is said to be misadventure. But we did all hold that there was a great difference betwixt the case in question, the house from which the timber was thrown standing thirty foot from the highway or common footpath, and the doing the same act in the streets of London; for we all agreed, that in London, that if one be a cleansing of a gutter, called out to stand aside, and then throw down rubbish, or a piece of timber, by which a man is killed, this is manslaughter; being in London, there is a continual concourse of people passing up and down the streets, and a new passenger, who did not hear him call out, and therefore the casting down any such thing from a house into the streets, is like the case where a man shoots an arrow or gun into a market-place full of people, if any one be killed it is manslaughter; because in common presumption his intention was to do mischief, when he casts or shoots any thing which may kill among a multitude of people; but in case that an house standing in a country town where there is no such frequency of passengers, if a man call out there to stand aside, and take heed, and then cast down the filth of a gutter, etc., my Brother Wylde and I held that a far different case from doing the same thing in London. And because my Lord Hyde differed in the principal case, it was found specially, but I take the law to be clear, that it is but misadventure.

REX v. BURTON.

(King's Bench, 1721. 1 Strange, 481.)

The defendant came to town in a chaise, and before he got out of it he fired his pistols, which by accident killed a woman; and KING, C. J. de C. B., ruled it to be but manslaughter.

KNIGHT'S CASE.

(Lancaster Assizes, 1828. 1 Lewin, C. C. 168.)

Prisoner was indicted for manslaughter. The evidence was that, being employed to drive a cart, he sat in the inside instead of attending at the horse's head, and while he was there sitting the cart went over a child who was gathering up flowers in the road.

Per BAYLEY, J. "The prisoner, by being in the cart instead of at the horse's head, or by its side, was guilty of negligence; and, death having been caused by such negligence, he is guilty of manslaughter."

Note.—A similar case occurred before Hullock, B., at the York Spring Assizes, 1829, and a similar judgment was delivered.

RIGMAIDON'S CASE.

(Lancaster Assizes, 1833. 1 Lewin, C. C. 180.)

Prisoner, a wine merchant at Liverpool, was indicted for manslaughter, in having, by negligence in the manner of slinging a cask or puncheon, caused the same to fall and kill two females who were passing along the causeway. It appeared in evidence that there were three modes of slinging casks customary in Liverpool: One by slings passed round each end of the cask; a second, by can-hooks; and a third, in the manner in which the prisoner had slung the cask, which caused the accident, viz., by a single rope round the center of the cask.

The cask was hoisted up to the fourth story of a warehouse, and on being pulled endways towards the door it slipped from the rope as soon as it touched the floor of the room.

Per PARKE, J., to the jury: "The double slings were undoubtedly the safest mode; but if you think the mode which the prisoner adopted, viz., that of a single rope, was reasonably sufficient, you cannot convict him."

Prisoner was convicted, and sentenced to a month's imprisonment.¹

STATE v. HARDIE.

(Supreme Court of Iowa, 1878. 47 Iowa, 647, 26 Am. Rep. 496.)

The defendant was indicted for murder in the second degree. He was convicted of the crime of manslaughter, and sentenced to the penitentiary for one year. The facts of the case appear in the opinion.

ROTHROCK, C. J.² It appears from the evidence that the defendant was a boarder in the family of one Gantz, who is his brother-in-law. On the day of the homicide defendant was engaged in varnishing furniture. Mrs. Sutfen, a neighbor, called at the house, and after some friendly conversation she went into the kitchen. When she came back, defendant picked up a tack hammer and struck on the door. She said, "My God, I thought it was a revolver." A short time afterwards she went into the yard to get a kitten. Defendant said he would frighten her with the revolver as she came in. He took

¹ Compare Reg. v. Finney, 12 Cox, C. C. 625 (1874).

² Part of the opinion is omitted.

a revolver from a stand drawer and went out of the room, and was in the kitchen when the revolver was discharged. He immediately came in and said to Mrs. Gantz, his sister, "My God, Hannah, come and see what I have done." His sister went out and found Mrs. Sutfen lying on the sidewalk at the side of the house, with a gunshot wound in the head, and in a dying condition.

The revolver had been in the house about five years. It was found by Gantz in the road. There was one load in it when found. Some six months after it was found Gantz tried to shoot the load from it, and it would not go off. He tried to punch the load out, but could not move it. He then laid it away, thinking it was harmless. The defendant was about the house and knew the condition of the revolver. Upon one occasion Gantz said he would try to kill a cat with the revolver. Defendant, being present, said he would not be afraid to allow it to be snapped at him all day. The revolver remained in the same condition that it was when found, no other load having been put into it, and it was considered by the family, as well as defendant, as entirely harmless.

That the revolver was in fact a deadly weapon is conclusively shown by the terrible tragedy consequent upon defendant's act in firing it off. If it had been in fact unloaded, no homicide would have resulted; but the defendant would have been justly censurable for a most reckless and imprudent act in frightening a woman by pretending that it was loaded, and that he was about to discharge it at her. No jury would be warranted in finding that men of ordinary prudence so conduct themselves. On the contrary, such conduct is grossly reckless and reprehensible, and without palliation or excuse. Human life is not to be sported with by the use of firearms, even though the person using them may have good reason to believe that the weapon used is not loaded, or that, being loaded, it will do no injury. When persons engage in such reckless sport, they should be held liable for the consequences of their acts.

Affirmed.²

STATE v. O'BRIEN.

(Supreme Court of New Jersey, 1867. 32 N. J. Law, 169.)

DALRIMPLE, J.³ On the 15th day of November, 1865, the defendant was a switch tender in the employ of the New Jersey Railroad & Transportation Company. His duty was to adjust, and keep adjusted, the switches of the road at a certain point in the city of Newark, so that passenger trains running over the road would continue

² For responsibility for negligence in the maintenance of dangerous animals, see *Reg. v. Dant, Leigh & C.* 567 (1865).

³ Part of this case is omitted.

on the main track thereof, and pass thence to the city of Elizabeth. He failed to perform such duty, whereby a passenger train of cars, drawn by a locomotive engine, was unavoidably diverted from the main track to a side track, and thence thrown upon the ground. The cars were thrown upon each other with great force and violence, by means whereof one Henry Gardner, a passenger upon the train, was so injured that he died. The defendant was indicted for manslaughter, and convicted upon trial in the Essex oyer and terminer. He insisted, and in different forms asked the court to charge the jury, that he could not legally be convicted unless his will concurred in his omission of duty. The court refused so to charge. A rule to show cause why the verdict should not be set aside was granted, and the case certified into this court for its advisory opinion, as to whether there was any error in the charge of the court below, or in the refusal to charge as requested.

The indictment was for the crime of manslaughter. If the defendant's omission of duty was willful, or, in other words, if his will concurred in his negligence, he was guilty of murder. Intent to take life, whether by an act of omission or commission, distinguishes murder from manslaughter. In order to make out against the defendant the lesser offense of manslaughter, it was not necessary that it should appear that the act of omission was willful or of purpose. The court was right in its refusal to charge, as requested.

The only other question is whether there is error in the charge delivered. The error complained of is that the jury were instructed that a mere act of omission might be so criminal or culpable as to be the subject of an indictment for manslaughter. Such, we believe, is the prevailing current of authority. Prof. Greenleaf, in the third volume of his work on Evidence (section 129), in treating of homicide, says: "It may be laid down that, where one by his negligence has contributed to the death of another, he is responsible. The caution which the law requires in all these cases is not the utmost degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end." Wharton, in his Treatise on Criminal Law (page 382), says: "There are many cases in which death is the result of an occurrence in itself unexpected, but which arose from negligence or inattention. How far in such cases the agent of such misfortune is to be held responsible depends upon the inquiry whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes, and the degree of caution requisite to bring the case within the limits of misadventure must be proportioned to the probability of danger attending the act immediately conducive to the death." The propositions, so well stated by the eminent writers referred to, we believe to be entirely sound, and are applicable to the case before us. The charge, in the respect complained of, was in accordance with them. It expressly states that it was a question of fact, for the jury

to settle, whether the defendant was or was not guilty of negligence; whether his conduct evinced under the circumstances such care and diligence as were proportionate to the danger to life impending. The very definition of crime is an act omitted or committed in violation of public law. The defendant in this case omitted his duty under such circumstances as amounted to gross or culpable or criminal negligence. The court charged the jury that if the defendant, at the time of the accident, was intending to do his duty, but in a moment of forgetfulness omitted something which any one of reasonable care would be likely to omit, he was not guilty. The verdict of guilty finds the question, in fact, involved in this proposition against the defendant, and convicts him of gross negligence. He owed a personal duty not only to his employers, but to the public. He was found to have been grossly negligent in the performance of that duty, whereby human life was sacrificed. His conviction was right, and the court below should be so advised.²

REGINA v. MACLEOD.

(Court of Criminal Appeal, 1874. 12 Cox, C. C. 534.)

Alexander Macleod was charged with the manslaughter of his wife, Annie Macleod, at Carlisle, on the 15th of October, 1873.

The case against the prisoner was that of having unlawfully killed his wife by having administered to her a large quantity of a certain drug called muriate of morphia. From the evidence it appeared the prisoner, who had been for about twenty or thirty years a surgeon on the medical staff of the Madras army in India, came over to live in England, about a year and a half or two years ago, and shortly after came to Carlisle, and brought with him the deceased woman, his wife. For a short time before the 15th of October, while the prisoner and his wife were living together in Chiswick street, Carlisle, one of their children, who was about six years of age, became ill of typhoid fever, and for a fortnight before that the deceased woman had

² Accord: *Reg. v. Pargeter*, 3 Cox, C. C. 1901 (1848); *Reg. v. Hughes*, 7 Cox, C. C. 301 (1857); cf. *Rex v. Green*, 7 Car. & P. 156 (1835). See, also, *U. S. v. Knowles*, 4 Sawy. (U. S.) 517, Fed. Cas. No. 15,540 (1864); *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349 (1892).

"If the prisoner is and has been afflicted in the manner claimed [with somnambulism], and knew, as he no doubt did, his propensity to do acts of violence when aroused from sleep, he was guilty of a grave breach of social duty in going to sleep in the public room of a hotel with a deadly weapon on his person, and merits, for that reckless disregard of the safety of others, some degree of punishment; but we know of no law under which he can be punished. Our law only punishes for overt acts done by responsible moral agents. If the prisoner was unconscious when he killed the deceased, he cannot be punished for that act, and, as the mere fact that he had a weapon on his person and went to sleep with it there did no injury to any one, he cannot be punished for that." *Cofer, J., in Fain v. Commonwealth*, 78 Ky. 183, 39 Am. Rep. 213 (1879).

been in a bad and weak state of health. That indisposition was materially increased by having to attend to her sick child, which she had done most assiduously, and for several days previous to the 15th of October she appeared never to have obtained good rest. In the middle of that day—the 15th of October—she appeared very unwell indeed, and the prisoner, finding she had not obtained any proper rest, determined to give her an opiate. At 4 p. m. he went to Mr. Todd, a chemist in the town, and there obtained in a bottle 20 grains of morphia, and paid eightpence for it, that being the price of that quantity to a medical man. The prisoner went home, gave his wife 1 grain, after weighing it, and repeated other doses without weighing them; altogether he administered something like $16\frac{1}{2}$ grains before 7 o'clock that evening, in about 3 or $3\frac{1}{2}$ hours. About 6:30 the prisoner went for Dr. Walker, and told him his wife had taken too much morphia, and as they were proceeding from Dr. Walker's house to the prisoner's they had a conversation in which the prisoner stated that he had given her repeated doses of morphia, that he had given her one grain as a first dose, which he had weighed, but that in repeating the doses he had not weighed them, but guessed the quantity. Dr. Walker, on his arrival, found the poor woman lying on the hearth rug in front of the fire, suffering from pain, and apparently unconscious. Dr. Walker tried various means of restoring her. At 20 minutes before 9 o'clock Dr. Maclaren was called in, and he injected atropine as an antidote. The deceased was then in a state almost comatose, and it was found impossible to rouse her. She died at 10 o'clock, having all the symptoms of death by morphia. Under these circumstances it was submitted by the prosecution that the conduct of the prisoner had been so heedless and reckless in giving such large doses of morphia that he was criminally liable, and was guilty of the offense of manslaughter.¹

DENMAN, J., in summing up the case to the jury, said the law was this: Whether a man be a medical man or not, if he dealt with dangerous medicines, he was bound to use them with proper skill, and was bound to bring proper care, and employ proper caution, so that persons should not be endangered by want of skill on his part, or want of caution or care in dealing with those deadly ingredients. Whether it be deadly weapons, or drugs, the law was the same, and it made no difference whether a medical man was dealing with a patient, or, as a volunteer, dealing with his friend or his wife. The jury might be enlightened by looking at the relations between the parties, and he was by no means prepared to say that, in judging of the evidence, it would not enlighten them very much, and enable them to appreciate the evidence on the main point, whether the man did not do his best, not in the sense of doing a bad best—but doing a good best; he being a medical man, and therefore likely to know whether

¹ Part of this case is omitted.

a drug was likely to be dangerous in the quantity administered or innocuous. There was ample evidence that the death of the deceased was caused by morphia. There was great difference of opinion as to the quantity of the drug which could be administered safely. However, if the jury were satisfied that the death was caused by morphia, and if it was administered without proper care, skill, and caution, and without a proper knowledge of morphia by the prisoner, whether in the weighing of the drug, or in any other way, that would be clear negligence—he would not use the term “gross negligence,” because it was liable to misinterpretation—and, if that was so, the prisoner would be guilty of manslaughter. But if the drug was administered without want of skill, and intending to do for the best—doing nothing, in fact, a skillful man might not do—then, if the jury merely thought it was some error of judgment, which anybody might have committed, the prisoner should be acquitted.

Not guilty.²

WESTRUP v. COMMONWEALTH.

(Supreme Court of Kentucky, 1906. 29 Ky. Law Rep. 519, 93 S. W. 646, 6 L. R. A. [N. S.] 685.)

Appeal by defendant from a judgment of the circuit court for Campbell county convicting him of manslaughter. Reversed. The facts are stated in the opinion.

SETTLE, J., delivered the opinion of the court. The appellant was indicted by the grand jury of Campbell county, and tried in the circuit court of that county, for involuntary manslaughter, alleged to have been committed by willfully neglecting to furnish his wife, then pregnant and about to be delivered of a child, with such care and attention as were necessary during her confinement in childbirth, thereby causing her death. Upon the trial the jury found appellant guilty as charged, and fixed his punishment at imprisonment in the county jail eight months, in conformity to which judgment was duly entered.³

According to the evidence, appellant's wife, Florence Westrup, died February 27, 1905, about two hours after giving birth to a child. She and appellant were married in Chicago in the year 1900, but had been living in Newport but a few months before her death, and had formed very few acquaintances there. They were an affectionate couple, though both were reserved in disposition and positive in their beliefs. He is an artist, and previous to his wife's death was at work for the Donaldson Lithographing Company, earning \$20 per week, and his wages, when received by him, were delivered to his wife for safe-keeping and use in their joint support. They were

² Accord: *State v. Hardister*, 38 Ark. 605, 42 Am. Rep. 5 (1882); *Commonwealth v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264 (1884).

³ Part of the opinion is omitted.

housekeeping in rented rooms of a house which was in part occupied by other renters, and the household work was done by the wife, with such assistance as the husband would take time from his own work to give her. The evidence further showed that the wife became pregnant, and was of opinion that her child would be born the 4th of March, 1905; that she was a woman of unusual intelligence, and, though never before with child, had some peculiar ideas as to the care to be taken of herself during pregnancy and of the child after its birth, in which her husband seems to have shared; that she was a strong believer in the laws of nature, and read many books on that subject and medicine, among which was one called "Tokology," written by Dr. Stockham, a female physician, of Chicago, with whom she corresponded before the birth of her child; that, as a result of her reading and correspondence with the female doctor, appellant's wife conceived a great aversion to physicians, and contended that they were too ready to resort in cases of childbirth to the use of instruments, which often resulted in death or injury to both mother and child, and declared her purpose to do without the services of one at the birth of her child. Adhering to this view, she by letter requested a sister of her husband, living in another state, to be with her in her confinement, naming March 4th as the date, and the sister promised to do so, and, without knowing of the illness of the appellant's wife, did in fact reach Newport on the day of and a few hours after her death. It also appeared from the evidence that appellant's wife was seized with labor pains early in the morning of the day on which she died; but, as she had previously suffered what appeared to be similar pains, which soon passed away, she and appellant remained, until shortly before the birth of the child, in the belief that she would not be confined before March 4th, five days later than the one on which she died. But, contrary to their expectations, the birth of the child occurred between 1 and 3 p. m. of that day, February 27, 1905, and, though for a short while thereafter the mother seemed to be doing well, about 4 o'clock she became worse, alarmed at which appellant called in two women residing in the same house, and, upon being advised by one of them that a physician should be summoned, he immediately sent for one, who upon reaching the wife's bedside attempted to give her some medicine, which she refused to take. The doctor, by appellant's direction, and notwithstanding the patient's objection, then made an examination of her person, and discovered that she had not been relieved of the afterbirth, which he attempted to remove; but, finding that it could not be done without his instruments, he went to his office for them, and upon his return to appellant's residence found that the patient had died during his absence of post partum hemorrhage, which, according to the testimony of the medical expert introduced in behalf of the commonwealth, sometimes follows childbirth, is nearly always fatal, and may be produced from many causes, such as retention of the afterbirth, laceration, weakness from disease,

unhygienic surroundings, or other causes. It does not appear from the evidence what caused the hemorrhage in this instance, as there was no post mortem examination held.

It is manifest from the evidence that the confinement of appellant's wife came five days sooner than they expected it; that she had resolved to do without the services of a physician in her confinement, and had influenced appellant to adopt her opinion that the services of a physician would be unnecessary at such a time; that during her labor he dutifully remained with her, and assisted her to the best of his ability, and as she directed him; that when he discovered her peril he called in two women living in the same house to assist him in caring for both mother and babe; that upon the suggestion of one of them he immediately, and over his wife's objection, sent for a competent physician to minister to her; and that the latter, in spite of her protestations, apparently did what he could, and all she would allow him to do, to relieve her, but failed to preserve her life. In view of the foregoing facts, and the further facts that appellant was an affectionate husband, and had never appeared indifferent to his wife or neglectful of any conjugal duty, and that in failing to earlier call in a physician he acted in good faith and at her request, though he doubtless erred in so doing, we fail to find any just or reasonable ground for the verdict of the jury; indeed, we think it wholly without support from the evidence. It is manifest that the prosecution was bottomed upon the failure of appellant to earlier provide his wife with a physician. Those of us who reverence the medical profession and implicitly trust the learning and skill of the family physician may be disposed to attribute to ignorance or prejudice such a lack of confidence in that profession as was manifested by the appellant's wife, and wonder that he, in the face of such a crisis as confronted them, should have allowed himself to be influenced to trust to nature's laws, or supernatural aid, rather than medical skill; but the fact remains that there are many who reject, as they did, both medicine and surgery for other means, or supposed means, of healing, and are perfectly sincere in doing so.

We may concede that appellant's wife made a grievous mistake in adhering to her purpose of rejecting medical aid; yet in view of the suffering, and in the end death, to which she subjected herself, her sincerity cannot be doubted. And certainly there was nothing in the evidence which tended to prove that appellant, though making the same mistake, was any less sincere than she, unless it was the fact of his sending for a physician after the birth of the child. This act, however, appears from the evidence to have resulted more from his desire to leave nothing undone for her relief than from a belief that benefit would result to the wife from the physician's presence or treatment. In any event, it was the very opposite of neglect, and should go to the credit, instead of the debit, side of appellant's accounting for the offense charged in the indictment. One cannot be said in any manner

to neglect or refuse to perform a duty, unless he has knowledge of the condition of things which require performance at his hands. In 21 Am. & Eng. Enc. of Law, p. 199, it is said: "Under the common law, no conviction of manslaughter, predicated upon an omission to provide medical attendance from conscientious motives, has been reported, and none can probably be had or sustained. Opinions have widely differed in all ages as to the proper mode of ministering to the sick, and, in the absence of a statute declaring it a positive duty upon a parent to call in a medical practitioner, the omission to do so can scarcely be considered negligence so gross and wanton as to be criminal, when the fact is admitted that the defendant acted in all good faith, doing the best he could according to his lights." In a note at the bottom of the same page and volume will be found the following from the case of *Reg. v. Wagstaffe*, 10 Cox, C. C. 530, quoting Willes, J., who said to the jury that "at different times people had come to different conclusions as to what might be done with a sick person. Two hundred years ago, if a child was afflicted with the King's evil, the popular feeling was, regardless of medical science, to have it touched with the royal hand, because that might result in effecting a cure. Again, in some Catholic countries, a custom obtained of taking a child laboring under a disease to a particular shrine, under a belief that that was the best course to adopt with a view to effect a cure. In such cases a man might be convicted of manslaughter because he lived in a place where all the community were of a different opinion, and in another he might be acquitted because they were all of his opinion. There was a very great difference between neglecting a child in respect to food, with regard to which there could be but one opinion, and neglect of medical treatment, as to which there might be many opinions."

It was argued for the commonwealth on the trial that the life of appellant's wife might or could have been saved if she had been attended by a physician during the birth of her child. We cannot say whether or not such would have been the result. It may also be claimed that, if the physician had not been sent for at all, she might have lived to rear her child, which is still alive and likely to continue so; for who can say that the hemorrhage of which the mother died was not caused by the attempt of the physician to remove the afterbirth without his instruments, or that, if he had not returned to his office for the instruments, he would have been present when the hemorrhage occurred, and might have prevented or checked it. The testimony throws no light on these matters. Therefore they cannot be solved, and to attempt to do so would be as idle as to invade the realm of speculation in quest of any other unknown or unknowable thing. As well may it be asked why some women die in childbirth, though attended by physicians, and others without their assistance often pass through that ordeal harmless. We can only determine from the record before us the questions that are capable of solution, and, if correct in the

conclusion hereinbefore expressed, that there was no evidence to support the verdict of the jury, it follows that the trial judge should have peremptorily instructed the jury to find appellant not guilty. Such being our view of the case, it is unnecessary to pass upon the other questions presented.

Wherefore the judgment is reversed, and case remanded for a new trial and further proceedings as directed by the opinion.²

REGINA v. MARRIOTT.

(Central Criminal Court, 1838. 8 Car. & P. 425.)

Murder. The first count of the indictment stated that it was the duty of the defendant to provide one Mary Warner, under the care and control of the defendant, with sufficient meat, drink, clothing, firing, and medicine, and that by the neglect of the defendant so to provide said Mary Warner with sufficient meat, etc., said Mary Warner became mortally diseased, and of said mortal disease died. There was a second count charging that the defendant willfully, etc., assaulted Mary Warner, and confined her in a certain dark, cold, unhealthy, and unwholesome room, without proper food, etc., by means of which she died.

From the evidence of the prosecution it appeared that the deceased, Mrs. Warner, who was about 74 years of age, had lived for some time with a sister in Cannon street, in the city, in a house which they let out in lodgings, and of which the sister had a lease under the Pewterers' Company. Upon the death of the sister whose name was Reepe, in March, 1837, the prisoner attended at the funeral, and, among others, a grandson of Mrs. Reepe, named Charles Reepe, was present. He was called as a witness, and gave his evidence as follows: "Mrs. Warner's sister was my grandfather's second wife. I remember the death of Mrs. Reepe. I went to her funeral, and saw the prisoner there. After the funeral he called me on one side, and asked me if I should have any objection to pay for my cloak, and my sister's, and my brother's also, as he did not wish to put Mary Warner to any expense, and he should pay for his. He told me he was left executor. He showed me about a quarter of a sheet of writing paper as a will, and told me he had found it by mere chance lying on the ground. I observed Mrs. Warner was much grieved, and took a chair and sat down by the side of her, and told her she should come and live at home with me, and I would make her happy and comfortable for the remainder of her life. Her reply was, that it was a kind offer, certainly. The prisoner said: "No, no, sir, she shall go home and

² See, also, *Reg. v. Knights*, 2 F. & F. 46 (1860); *Reg. v. Shepherd*, 1 Leigh & C. 447 (1862).

live along with me, as you are no relation whatever." I asked him what relation he was. He said he was a townsman, and that he had buried Mrs. Reepe's sister, and it was Mrs. Reepe's wish that he should bury her too; in fact, that he was executor. He said: "Mrs. Warner is going home to live along with me until affairs are settled, and I will make her happy and comfortable."

To prove the interference of the prisoner in Mrs. Warner's affairs, as well as to show that he had undertaken to provide her with food and other necessaries, a Mrs. Cruikshank was called as a witness. She said: "I am the wife of Robert Cruikshank, and live at No. 34 Cannon street, city. Some days previous to the 10th of October I went with my husband to No. 1 Dolphin Court. I there saw the prisoner and his wife. Mr. Marriott asked me to write an agreement about the house No. 34 Cannon street, of which Mr. Cruikshank was to take the upper part. I heard the prisoner mention the name of Mary Warner to his wife. He talked in an indistinct tone. I could hear nothing more than the name of Mary Warner. Mrs. Marriott dissented to what he said, whatever it was, and he again repeated it to her, and she again dissented. I asked the prisoner what interest Mrs. Warner had in the house, and he said, 'None whatever.' He asked me 'if I remembered a conversation he had with me respecting the decease of Mrs. Reepe.' I told him, 'Perfectly well.' He said, 'Did I not remember he had told me at Mrs. Reepe's decease that Mrs. Warner was her sister.' I inquired in what way Mrs. Warner could be a party to the agreement. His reply was, 'None whatever.' He said something about her not being capable of undergoing the fatigue; that at her advanced age she was quite incapable; that he had been accustomed to let lodgings. There was an agreement ultimately signed. I produce it. It is not stamped. After it had been signed, I inquired whether Mrs. Warner was a relative, as he seemed to take such an interest in her affairs. He said, 'None at all.' He said, respecting the house in Cannon street, Mrs. Warner having been accustomed to let lodgings, he had taken the lease of the house of the Pewterers' Company, on condition of paying up an arrear of rent; that they had given him four years to pay it by three installments, £20 of which he had paid, in consideration of which he had undertaken to keep Mrs. Warner comfortable as long as she lived. I wished to purchase some of the furniture, and he said I might make my own selection. He did not say to whom it belonged. I understood it was his own property. He did not speak of it as anybody's property but his own. He appointed a Mr. Kelly to value the furniture in the house in Cannon street to Mr. Cruikshank, and a Mr. Phillips was appointed to value it for us. The amount of the valuation was £37, within a few shillings. That has not been paid. We were to pay it to Mr. Marriott. On her cross-examination she said: "When the name of Mary Warner was mentioned, and Mrs. Marriott shook her head, the prisoner said, 'Yes, yes, better;' and the name of Mary

Warner was put into the agreement, because Mrs. Marriott asked me to do so."

The clerk to the Pewterer's Company was called and he said: "There was never any premises in Cannon street let to the prisoner. He never at any time took a lease in any shape from the Pewterers' Company. He has paid two installments of £11 15s. each for arrears of rent due from Mrs. Reepe. He paid it as her executor. He so stated." On his cross-examination he was asked whether there was not a petition sent in on the part of Mary Warner, as the sister of Mrs. Reepe, to let her off the arrears in consideration of her long tenancy. His reply was: "There was a memorial sent in in the name of the prisoner. He stated his object to be to serve Mary Warner. The prayer of the petition was not acceded to. He made himself answerable for the amount, and signed a written memorandum." The will of Mrs. Reepe was read. It was dated the 26th of March, 1836, bequeathing to Mrs. Warner all her effects, and the lease of the house in Cannon street. A clerk in the Prerogative Office was called, and stated that the personal property was sworn under £100, and that letters of administration were granted the 20th of July, 1837; that Mrs. Warner must have appeared personally; and that the prisoner was one of her sureties for the proper administration of the effects.¹

PATTESON, J., in summing up (after stating the first count of the indictment and observing upon certain parts of the evidence), said: If the prisoner was guilty of willful neglect, so gross and willful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing. [His Lordship then read the statements of Mr. Reepe, and Mrs. Cruikshank, and continued:] This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; and though, if he broke that contract, he might not be liable to be indicted during her life, yet, if by his negligence her death was occasioned, then he becomes criminally responsible.

Verdict—Guilty of manslaughter only.

¹ The statement is abridged, and a portion of the evidence not bearing on the duty of the defendant is omitted.

REGINA v. POCOCK.

(Queens Bench, 1851. 5 Cox, C. C. 172.)

This was a rule to quash a coroner's inquisition which had been removed into this court by certiorari. The inquisition alleged that the defendants were the trustees of a public road under an act of Parliament; that it was their duty to contract for the due reparation of the said road; that they feloniously did neglect and omit to contract for the repair of the same, whereby it became very miry, ruinous, deep, broken, and in great decay; and that a cart, which the deceased was driving along the road, fell into a hole in the road, and by reason thereof the deceased was thrown out, and sustained the injuries of which he afterwards died.

Charnock showed cause. This case is not distinguishable from those of persons who have the charge of machinery at mines, of signals or locomotives on railways, and the like; and there are many precedents of indictments for manslaughter in such cases where death has been occasioned by a neglect of duty on the part of the persons so intrusted. *R. v. Barrett*, 2 Car. & K. 343; *R. v. Haines*, Id. 368; *R. v. Gregory*, 5 B. & Ad. 555. Here a public duty was cast upon the trustees, and they were authorized to raise money by rates for the purpose; and if their neglect of duty has caused the death of another they are guilty of manslaughter.

Hayes, contra, was not called upon.

Lord CAMPBELL, C. J. The cases cited show a personal duty, the neglect of which has directly caused death; and, no doubt, where that is the case, a conviction of manslaughter is right. But how do those apply to trustees of a highway? How can it be said that their omission to raise a rate, or to contract for the reparation of the road, directly causes the death? If so, the surveyors or the inhabitants of the parish would be equally guilty of manslaughter; for the law casts upon them the duty of keeping the roads in repair. To uphold this inquisition would be to extend the criminal law in a most alarming manner, for which there is no principle or precedent.

PATTESON, J. This is really too extravagant.

WIGHTMAN, J., concurred.

ERLE, J. In all the cases of indictment for manslaughter, where the death has been occasioned by omission to discharge a duty, it will be found that the duty was one connected with life, so that the ordinary consequence of neglecting it would be death. Such are the cases of machinery at mines, of engine drivers, or the omission to supply food to helpless infants.

Inquisition quashed.

CHAPTER V.

INTENT AS AFFECTED BY CONDITIONS.

SECTION 1.—IGNORANCE OR MISTAKE OF LAW.

REX v. THURSTON.

(King's Bench, 1649. 1 Lev. 91.)

Indictment of murder, and on a special verdict found at the Assizes at Bury, the case was: In Hillary Term, 1659, a latitat issued to arrest him, returnable in Easter Term, 1660, on which the twenty-ninth of May he was arrested by a warrant thereupon, and upon that arrest the bailiff was killed; and afterwards an act is made for the confirmation of all judicial proceedings, which related to the first day of the Parliament, viz., 15 April, 1660, and the sole question was, if by the relation of the act which made the proceedings legal and the arrest good (which else had been void and without authority), this killing be murder. And it was argued at the bar by Kelynge, for the King, and by Jones, for the defendant: And Kelynge said, that by relation all the process is made good, for it shall relate to the first day of the Parliament; Jones argued the act should relate to the first day of the Parliament, but not to such intent as to make it murder *ex post facto*, which was not so when the fact was done. The court said nothing; but afterwards, in Easter Term, 16 Car. II, I heard Thurston plead his pardon of this murder, whereby it seems as if the opinion of the court was against him.

STATE v. BOYETT.

(Supreme Court of North Carolina, 1849. 32 N. C. 336.)

PEARSON, J.¹ "*Ignorantia legis neminem excusat.*" Every one competent to act for himself is presumed to know the law. No one is allowed to excuse himself by pleading ignorance. Courts are compelled to act upon this rule, as well in criminal as civil matters. It lies at the foundation of the administration of justice. And there is no telling to what extent, if admissible, the plea of ignorance would be car-

¹ The opinion only is printed.

Summary of Notes of day

I. It is not correct to say that a man is prepared to have to
have less p. 104/26

I. May need only see the time is up, because all the following
the way we found that the dirt and the water from
The two new applied natural science parks in general, it was
which can be used, by way of the

11. Since I've been interested in really being a good student, I've
written up the elements of the course, of course, and they're organized around
element, they should be a reference.

1. *L. t. l.* has been held to be a species distinct in form and size from *l. t. l.* and is not a variety, but a new species.
- An *A. t. l.* has been found, having many points of difference from *l. t. l.* and is not a variety.

- [illegible]

As A you this is fine. I have been thinking of
all the friends of this year this fine of the morning
and the whole of the morning.

On 5 Aug 1964, 1000000

ried, or the degree of embarrassment that would be introduced into every trial, by conflicting evidence upon the question of ignorance.

In civil matters, it is admitted, the presumption is frequently not in accordance with the truth. The rules of property are complicated systems—the result, “not of the reason of any one man, but of many men put together”; hence they are not often understood, and more frequently not properly applied, and the presumption can only be justified upon the ground of necessity. But in criminal matters the presumption most usually accords with the truth. As to such as are *mala in se*, every one has an innate sense of right and wrong, which enables him to know when he violates the law, and it is of no consequence if he be not able to give the name by which the offense is known in the lawbooks, or to point out the nice distinctions between the different grades of offense. As to such as are “*mala prohibita*,” they depend upon the statutes printed and published and put within the reach of every one; so that no one has a right to complain if a presumption, necessary to the administration of the law, is applied to him. To allow ignorance as an excuse would be to offer a reward to the ignorant.

The defendant voted, when he was not entitled by law to vote. He is presumed to know the law. Hence he voted, knowing that he had no right, and, acting with this knowledge, he necessarily committed a fraud upon the public—in the words of the act, he knowingly and fraudulently voted when he was not entitled to vote. It being proved on the part of the state that he voted, not having resided within the bounds of the company for six months next preceding the election, a case was made out against him.

He offered to prove, for the purpose of rebutting the inference of fraud, that he had stated the facts to a respectable gentleman, who advised him he had a right to vote. His honor held the testimony inadmissible. We concur in that opinion.

The evidence had no tendency to rebut the inference of fraud, for the inference was made from his presumed knowledge of the law, and that presumption could not be met by any such proof, without introducing all the evils which the rule was intended to avoid. The question, in effect, was: Shall a man be allowed, in excuse of a violation of the law, to prove that he was ignorant of the very law under which he professed to act, and under which he claimed the privilege of voting? If he was not ignorant of the law, and that he cannot be heard to allege, then he voted knowingly, and, by necessary inference, fraudulently.

An indictment for extortion charges that the defendant received the fee “unlawfully, corruptly, deceitfully, and extorsively.” This averment the state must prove. It is done by showing that the defendant received what the law does not allow him to take; for the presumption is “he knew the law upon the subject of fees to be taken by himself,” and the inference from such knowledge is that he acted “corruptly and deceitfully” (words quite as strong as knowingly and

fraudulently), unless it is shown that he did so by some inadvertence or mistake in calculation. He cannot excuse himself for taking more than the legal fee by saying that he was misled by the advice of an attorney. If such, or like, excuses were admitted, it would hardly ever be possible to convict. He might always contrive to ground his conduct upon misapprehension or improper advice. *State v. Dickens*, 2 N. C. 406. It would be a different question if the defendant had stated the facts to the judges of the election, and they had decided in favor of his right to vote; for their decision would rebut the presumption of knowledge on his part in a manner contemplated by law.

The case was ably argued for the defendant. It was insisted that it was necessary for the state to aver and prove that the defendant voted knowingly and fraudulently. That position is admitted. The reply is the averment was made and was proved; for, proof being made that he voted when he was not entitled to vote, the presumption is that he knew the law, and fraud is the necessary inference, as corruption and deceit were in the case above cited. It cannot be contended that, to fix him with knowledge, the state must show that some one read and explained the law to him; or, to fix him with fraud, that it must be proven he had been bribed. If so, the statute is a dead letter. Our attention was called to the fact that the act of 1844 (*Laws 1844-45*, p. 67, c. 43), making the offense indictable, uses the words, "knowingly and fraudulently," which words are not used in the act of 1777, imposing a penalty. To incur the penalty under the act of 1777, the voting must be unlawful, and it must be done knowingly and fraudulently, in the sense above explained. If one, having a deed for 50 acres of land, votes in the Senate, and it turns out that the deed only contains 49 acres, the penalty is not incurred, unless he knew the fact at the time he voted. So, if one votes for a constable, and it turns out that the dividing line includes him in another company, there is not in either case that criminal intent which is a necessary ingredient of the offense, whether it be punished by a penalty or by indictment. The act of 1844 expresses in so many words what the law would have implied. It is a strained inference that by so doing the Legislature intended to make the case of illegal voting an "exception," and to take it out of the rule "*ignorantia legis*," a rule which has always been acted upon in our law, and in the laws of every nation of which we have any knowledge, and without which, in fact, the law cannot be administered. The inference sought to be made results in this: The Legislature did not intend the act of 1844 to be carried into effect. It was intended to be "*brutum fulmen*." No reason has been suggested for making an exception in this case. The only additional qualification to that of a voter for a member of the House of Commons is a residence of six months in the captain's company.

This is not complicated or difficult to be understood. Why make the exception, and offer a reward for ignorance in this particular case?

Such a construction cannot be admitted, unless the lawmakers had declared their intention by positive enactment.

PER CURIAM. There is no error in the court below, and the same must be so certified.²

CUTTER v. STATE.

(Supreme Court of New Jersey, 1873. 36 N. J. Law, 125.)

The opinion of the court was delivered by BEASLEY, C. J.³ The defendant was indicted for extortion in taking fees to which he was not entitled, on a criminal complaint before him as a justice of the peace. The defense which he set up, and which was overruled, was that he had taken these moneys innocently, and under a belief that by force of the statute he had a right to exact them.

This subject is regulated by the twenty-eighth section of the act for the punishment of crimes. Nix. Dig. 197. This clause declares that no justice or other officer of this state shall receive or take any fee or reward to execute and do his duty and office but such as is or shall be allowed by the laws of this state, and that "if any justice, etc., shall receive or take, by color of his office any fee or reward whatsoever, not allowed by the laws of this state, for doing his office, and be thereof convicted, he shall be punished," etc.

If the magistrate received the fees in question without any corrupt intent, and under the conviction that they were lawfully his due, I do not think such an act was a crime by force of the statute above cited.

But it is argued on the part of the prosecution that as the fees to which the justice was entitled are fixed by law, and as he cannot set up as an excuse for his conduct his ignorance of the law, his guilty knowledge is undeniable. The argument goes upon the legal maxim, "*Ignorantia legis neminem excusat.*" But this rule, in its application to the law of crimes, is subject, as it is sometimes in respect to civil rights, to certain important exceptions. Where the act done is *malum in se*, or where the law which has been infringed was settled and plain, the maxim, in its rigor, will be applied; but where the law is not settled, or is obscure, and where the guilty intention, being a necessary constituent of the particular offense, is dependent on a

² Accord: Illegal voting, *McGuire v. State*, 7 Humph. (Tenn.) 54 (1846); keeping gaming house, *Winehart v. State*, 6 Ind. 30 (1854); statutory larceny, *State v. Welch*, 73 Mo. 284, 39 Am. Rep. 515 (1880); bigamy, *People v. Weed*, 29 Hun (N. Y.) 628 (1883); murder, *Weston v. Commonwealth*, 111 Pa. 251, 2 Atl. 191 (1886); opening grave, *State v. McLean*, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721 (1897); unlawful discrimination, *State v. Railway*, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246 (1898); compounding crime, *State v. Carver*, 69 N. H. 216, 39 Atl. 973 (1897); false imprisonment, *Begley v. Commonwealth (Ky.)* 60 S. W. 847 (1901). Cf. *Commonwealth v. Bradford*, 9 Metc. (Mass.) 268 (1845).

³ Part of the opinion relating to another point is omitted.

knowledge of the law, this rule, if enforced, would be misapplied. To give it any force in such instances would be to turn it aside from its rational and original purpose, and to convert it into an instrument of injustice. The judgments of the courts have confined it to its proper sphere. Whenever a special mental condition constitutes a part of the offense charged, and such condition depends on the question whether or not the culprit had certain knowledge with respect to matters of law, in every such case it has been declared that the subject of the existence of such knowledge is open to inquiry as a fact to be found by the jury. This doctrine has often been applied to the offense of larceny. The criminal intent, which is an essential part of that crime, involves a knowledge that the property taken belongs to another; but even when all the facts are known to the accused, and so the right to the property is a mere question of law, still he will make good his defense if he can show in a satisfactory manner that, being under a misapprehension as to his legal rights, he honestly believed the articles in question to be his own. *Rex v. Hall*, 3 Car. & P. 409; *Reg. v. Reed*, Car. & M. 306.

The adjudications show many other applications of the same principle, and the facts of some of such cases were not substantially dissimilar from those embraced in the present inquiry. In the case of *People v. Whaley*, 6 Cow. (N. Y.) 661, a justice of the peace had been indicted for taking illegal fees, and the court held that the motives of the defendant, whether they showed corruption or that he acted through a mistake of the law, were a proper question for a jury. The case of *Commonwealth v. Shed*, 1 Mass. 228, was put before the jury on the same ground. This was likewise the ground of decision in the case of *Commonwealth v. Bradford*, 9 Metc. (Mass.) 268; the charge being for illegal voting, and it being declared that evidence that the defendant had consulted counsel as to his right of suffrage and had acted on the advice thus obtained was admissible in his favor. This evidence was only important to show that the defendant, in infringing the statute, had done so in ignorance of the rule of law upon the subject. Many other cases resting on the same basis might be cited; but the foregoing are sufficient to mark clearly the boundaries delineated by the courts to the general rule that ignorance of law is no defense when the mandates of a statute have been disregarded or a crime has been perpetrated. That the present case falls within the exceptions to this general rule appears to me to be plain. There can be no doubt that an opinion very generally prevailed that magistrates had the right to exact the fees which were received by this defendant and that they could be legally taken under similar circumstances. The prevalence of such an opinion could not, it is true, legalize the act of taking such fees; but its existence might tend to show that the defendant, when he did the act with which he stands charged, was not conscious of doing anything wrong.

If a justice of the peace, being called upon to construe a statute

with respect to the fees coming to himself, should, exercising due care, form an honest judgment as to his dues, and should act upon such judgment, it would seem palpably unjust, and therefore inconsistent with the ordinary grounds of judicial action, to hold such conduct criminal if it should happen that a higher tribunal should dissent from the view thus taken, and should decide that the statute was not susceptible of the interpretation put upon it. I think the defendant had the right in this case to prove to the jury that the moneys, which it is charged he took extorsively, were received by him under a mistake as to his legal rights, and that, as such evidence, being offered by him, was overruled, the judgment on that account must be reversed.²

SECTION 2.—IGNORANCE OR MISTAKE OF FACT.

In the case of Sir William Hawksworth; related by Baker in his *Chronicle of the Time of Edward IV*, p. 223 (sub anno, 1471), he being weary of his life and willing to be rid of it by another's hand, blamed his parker for suffering his deer to be destroyed, and commanded him that he should shoot the next man that he met in the park that would not stand or speak. The knight himself came in the night into the park, and, being met by the keeper, refused to stand or speak. The keeper shot and killed him, not knowing him to be his master. This seems to be no felony, but excusable by the statute of malefactors in parcis, for the keeper was in no fault, but his master; but, had he known him, it had been murder. 1 Hale, P. C. 40.

STATE v. McDONALD.

(St. Louis Court of Appeals, 1879. 7 Mo. App. 510.)

LEWIS, P. J., delivered the opinion of the court.³

The defendant, a car driver and conductor on the Lindell Railway, was convicted in the court of criminal correction of an assault and battery committed upon the person of Oscar Wiens. The only question raised by the appeal is whether, when a passenger on a street

² Accord: *Perjury*, U. S. v. Conner, 3 McLean (U. S.) 573, Fed. Cas. No. 14,847 (1845); *malicious mischief*, Goforth v. State, 8 Humph. (Tenn.) 37 (1847); *trespass*, State v. Hause, 71 N. C. 518 (1874); *conspiracy*, People v. Powell, 63 N. Y. 88 (1875); *larceny*, People v. Husband, 36 Mich. 306 (1877); *extortion*, Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44 (1880). See, also, Reg. v. Allday, 8 Car. & P. 136 (1837).

³ Part of the opinion is omitted.

car has in fact paid his fare, the conductor is justified in forcibly ejecting him from the car because he, the conductor, honestly believes that the passenger has not paid his fare, but persistently refuses so to do.

Crime cannot exist without a criminal intent. A man at midnight discovers an intruder on his premises, under circumstances which furnish reasonable cause to apprehend that a felony is in progress, or about to be perpetrated. He kills the supposed burglar, in the honest belief that nothing less will save his own life or property. It turns out that the intruder was innocent of any criminal purpose, yet his slayer has committed no crime, either in morals or in law, deserving punishment. The criminal intent was wanting. A person passes counterfeit money, being ignorant of its character and honestly believing it to be genuine. The one who receives it may recover for the wrong done him, notwithstanding the innocent mistake of the passer; and yet an indictment against the passer of the money would fail, because he was guilty of no criminal intent. In the case before us, according to the facts stated, the defendant honestly believed that he was simply discharging his duty in putting off the passenger who refused to pay his fare, and therefore in so doing he committed no crime. The court erred in giving instructions in support of a contrary view, and in refusing instructions prayed for by the defendant which were in harmony with the principles herein declared.

The judgment is reversed, and the cause remanded. All the Judges concur.

REGINA v. MACHEKEQUONABE.

(High Court of Justice for Ontario, 1896. 28 Ont. 309.)

This was a case reserved under the Criminal Code of 1892, amending Act 58 & 59 Vict. c. 40, (D), as to whether the prisoner was properly convicted of manslaughter.

The trial took place at Rat Portage on the 3d of December, 1896, before Rose, J., and a jury.

It appeared from the evidence that the prisoner was a member of a tribe of pagan Indians, who believed in the existence of an evil spirit clothed in human flesh, or in human form, called a "Wendigo," which would eat a human being.

That it was reported that a Wendigo had been seen, and it was supposed was in the neighborhood of their camp, desiring to do them harm.

That among other precautions to protect themselves, guards and sentries, the prisoner being one, were placed out in pairs armed with firearms (the prisoner having a rifle); that the prisoner saw what appeared to be a tall human being running in the distance, which he supposed was the Wendigo; that he and another Indian gave chase

and after challenging three times and receiving no answer fired and shot the object, when it was discovered to be his own foster father, who died soon afterward.

The jury found affirmative answers to the following questions: "Are you satisfied the prisoner did kill the Indian?" "Did the prisoner believe the object he shot at to be a Wendigo or spirit?" "Did he believe the spirit to be embodied in human flesh?" "Was it the prisoner's belief that the Wendigo could be killed by a bullet shot from a rifle?" "Was the prisoner sane, apart from the delusion or belief in the existence of a Wendigo?"

The learned trial judge then proceeded with his charge as follows:

"Assuming these facts to be found by you, I think I must direct you as a matter of law that there is no justification here for the killing; and culpable homicide without justification is manslaughter, so that, unless you can suggest to yourselves something stated in the evidence or drawn from the evidence to warrant a different conclusion, I think it will be your duty to return a verdict of manslaughter. You may confer among yourselves, if you please, and if you take that view I will reserve a case for consideration by the Court of Appeal as to whether he was properly convicted upon this evidence."

The jury found the prisoner guilty of manslaughter, recommending him to mercy, and the learned judge reserved a case for consideration whether upon the findings of the jury in answer to the questions he had submitted, and upon his direction to them, and upon the evidence, the prisoner was properly found guilty of manslaughter.

The case was argued on February 8, 1897, before a divisional court composed of ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ.

J. K. Kerr, Q. C., for the prisoner.¹

John Cartwright, Q. C., Deputy Attorney General, was not called on.

The judgment of the court was delivered by ARMOUR, C. J.

Upon the case reserved, if there was evidence upon which the jury could find the prisoner guilty of manslaughter, it is not open to us to reverse that finding, and the question we have to decide is whether there was such evidence.

We think there was, and therefore do not see how we can say that the prisoner was not properly convicted of manslaughter.

STATE v. NASH.

(Supreme Court of North Carolina, 1883. 88 N. C. 618.)

Indictment for assault and battery, tried at the Fall term, 1882, of Richmond superior court, before Gilmer, J.

The defendant was put upon the stand as a witness in his own behalf, admitted that he fired the gun at the crowd, and proposed to

¹ The argument of counsel for the defendant is omitted.

prove that, before he fired, his child, who was sleeping near a window in the house, through which the noise of the bells and horns and firing was heard and the flash of the firing seen, rose up and ran to the witness with blood on her face (caused, as he afterwards learned, but did not then know, by her running against the end of a table), and under the impulse of the moment, believing that she had been shot, he got his gun and went to the door, and, seeing the flash of pistols, fired, as he supposed, by the retreating crowd, fired his gun at and into the crowd. This evidence was objected to by the state and excluded by the court, and the defendant excepted.

The court instructed the jury that the defendant had not shown justification for the shooting. Verdict of guilty; judgment; appeal by the defendant.¹

ASHE, J. The question presented by the record is, was there error in the refusal of the judge to receive the evidence offered by the defendant? We are of the opinion there was error in rejecting so much of the proposed testimony as tended to show, on the part of the defendant, a reasonable ground of belief that the trespassers upon his premises had fired into his house and wounded his child.

It may be, as testified by the prosecutor, that the band of young men who went to the defendant's house on the night in question only intended innocent amusement; but there is one unusual and rather extraordinary feature in the transaction—that the party intending a mere serenade should, on such an occasion, carry guns and pistols. They are certainly very unusual instruments of music in the hands even of a calithumpian band.

They entered the inclosure, 20 in number, and marched round the house, blowing horns, ringing bells, and firing guns and pistols, which must have greatly frightened the family and the defendant himself, unless he is a man of more than ordinary courage. But, whether awed or not by such a display of numbers and lawlessness, yielding to the dictates of prudence, he submitted to the humiliating indignity and remained within doors until his little daughter, as he proposed to show, ran to him with her face bleeding; and believing, as was natural under the circumstances, that she had been shot, he seized his gun and went to the door, saw the flash of firearms, shot into the crowd, and wounded the prosecutor. We must suppose it was all the work of an instant. Did the defendant, under these circumstances, have reasonable ground to believe that his daughter had been shot, and the assault upon him and his house was continuing? If he had, then he ought to have been acquitted.

We know this has been a much mooted question, but upon an investigation of the authorities our conclusion is that a reasonable belief that a felony is in the act of being committed on one will excuse the killing of the supposed assailant, though no felony was in fact

¹ The statement of facts is abridged.

intended; and whatever will excuse homicide will, of course, excuse assault and battery.

In *State v. Scott*, 26 N. C. 409, 42 Am. Dec. 148, the court says: "In consultation it seemed to us at one time that the case might properly have been left to the jury, favorably to the prisoner, on the principle of *Levet's Case*, Cro. Car. 538, 1 Hale, 474, which is that if the prisoner had reasonable ground for believing that the deceased intended to kill him, and under that belief slew him, it would be excusable, or, at most, only manslaughter, though in truth the deceased had no such design at the time." It is to be noted that *Levet* was acquitted. But the court did not give the prisoner, in *Scott's Case*, the benefit of the principle, for the reason that no such instruction had been asked in the court below; the court concluding that the prisoner would have requested the instruction, if he had acted upon such belief, and there were, besides, other circumstances in the case which prevented the application of the principle. But it is clearly to be deduced from the opinion of Chief Justice Ruffin, who spoke for the court, that in a proper case the principle might be invoked to excuse a defendant. See, also, *Patterson v. People*, 46 Barb. (N. Y.) 627.

The same doctrine was enunciated by Parker, J., afterwards Chief Justice of the Supreme Court of Massachusetts, in the famous case of *Commonwealth v. Selfridge*, Self. Trial, 100, and the principle is thus illustrated: "A., in the peaceful pursuit of his affairs, sees B. walking towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head before or at the same instant the pistol is fired, and of the wound B. dies. It turned out that the pistol was in fact loaded with powder only, and that the real design of B. was only to terrify A." The judge inquired: "Will any reasonable man say that A. is more criminal than he would have been if there had been a ball in the pistol?" 2 Whar. Crim. Law, § 1026 (g), and note; Whar. Law of Homicide, 215 et seq.

But it may be objected that the defendant acted too rashly. Before he resorted to the use of his gun, he should have taken the precaution to ascertain the fact whether his child had been actually shot. But that doctrine is inconsistent with the principle we have announced. If the defendant had reason to believe and did believe in the danger, he had the right to act as though the danger really existed and was imminent. Taking, then, the fact to be that the trespassers had fired into the defendant's house and shot his child, and the firing continued, there was no time for delay. The occasion required prompt action. The next shot might strike him or some other member of his family. Under these circumstances the law would justify the defendant in firing upon his assailants in defense of himself and his family.

But, as we have said, the grounds of belief must be reasonable.

The defendant must judge, at the time, of the ground of his apprehension, and he must judge at his peril; for it is the province of the jury on the trial to determine the reasonable ground of his belief. And here the error is in the court's refusing to receive the proposed evidence, and submitting that question to the consideration of the jury. A *venire de novo* must be awarded.²

SMITH, C. J. (dissenting). I am unable to concur with the other members of the court in the conclusion reached that the testimony of the defendant in explanation of his conduct, if admitted and believed, would be a defense to the charge, or have any other legal effect than to mitigate his offense; and hence, as immaterial upon the issue and tending to mislead, there is no error in rejecting it.

The facts in connection with this proposed statement are summarily as follows: A boisterous and unruly crowd, in what seems to have been a frolic, enter the defendant's premises in the early night with bells, horns, and firearms, by the noise of which as they pass round his dwelling himself and his family are greatly annoyed and their peace disturbed. As they are about to leave, his little frightened daughter runs up to him with blood upon her face, caused by her striking against a table, but which he then supposed to proceed from a shot wound. Acting upon the impulse produced by this misconception, and without stopping to make inquiry as to the cause or extent of the inquiry [injury?], he seizes his gun, loaded with shot of large size, hastens to the door and out into the porch, and, seeing the flash of the gun, fires into the retreating body, then near the outer gate, some 35 yards distant, without a word of warning or remonstrance, and wounds one of the number in the leg.

This was, in my opinion, a hasty and unauthorized act in the use of a deadly weapon, not in defense of himself or family or premises, but the offspring of a spirit of retaliation for what he erroneously supposed to have been done, and whose error could have at once been corrected. If death had ensued, the circumstances would not have excused the homicide, and, as it was not fatal, it cannot be less than an assault.

Human life is too safely guarded by law to allow it to be put in peril upon such provocation, and, however much it may palliate the defendant's impulse and the rash act in which it resulted, it cannot, in my opinion, excuse his use of a deadly instrument in so reckless a manner.

PER CURIAM. *Venire de novo*.

² Accord: *Reg. v. Rose*, 15 Cox, C. C. 540 (1884). Cf. *Isham v. State*, ante, p. 81; *State v. Downs*, 91 Mo. 19, 3 S. W. 219 (1886).

SECTION 3.—INFANCY.

Item.—A girl of thirteen years of age was burnt because while she was servant to a woman she killed her mistress; and it was found to be so and adjudged treason. And it was said that by the old law no one under age was hung, or suffered judgment of life or limb. But Spigurnel found that an infant of ten years of age killed his companion and concealed him; and he caused him to be hung, because by the concealment he showed that he knew how to distinguish between evil and good. And so malice makes up for age. Year Book, 12 Edward III, 626.

GODFREY v. STATE.

(Supreme Court of Alabama, 1858. 31 Ala. 323.)

WALKER, J.¹ The single point to be considered in this case is whether the charge of the court below to the jury was correct. An analysis of that charge shows that the jury were strictly instructed that the defendant, being between seven and fourteen years of age, was prima facie incapable of committing crime; that, to overturn the intendment in favor of his incapacity to commit crime, the jury must be convinced from the evidence beyond a reasonable doubt, after allowing due consideration to the fact that the accused was a negro and a slave, that he knew fully the nature of the act done and its consequences; and that he showed plainly intelligent design and malice in the execution of the act. This charge, after an anxious and careful examination of it, we cannot pronounce erroneous.

An infant, above seven, but under fourteen, years of age, is presumed not to have such knowledge and discretion as would make him accountable for a felony committed during that period. But, if that presumption is met by evidence clearly proving the existence of that knowledge and discretion deemed requisite to a legal accountability, the reason for allowing an immunity from punishment ceases, and with it the rule which grants such immunity ceases. There are many cases where children between those ages, being shown to have been cognizant of the criminal nature of the act done, have been punished under the criminal law. A girl, thirteen years of age, was executed for killing her mistress. Two boys, one nine, and the other ten, years of age, were convicted of murder, because one of them hid himself, and the other hid the dead body, thus manifesting as was supposed, a consciousness of guilt and a discretion to discern between good and

¹ The opinion only is printed.

evil. A boy of eight years of age, who had malice, revenge, and cunning, was hanged for firing two barns. A boy ten years old, who showed a mischievous discretion, was convicted of murdering his bed-fellow. 4 Bl. Com. 23, 24.

In the case of *Rex v. Owen*, 2 Car. & P. 236, it was referred to the jury to determine whether the act of a girl ten years old, alleged to constitute a larceny, was known by her to be wrong when it was done; and upon that question she was acquitted. It is said in *Hale's Pleas of the Crown*, p. 22, that one between the ages of seven and fourteen might be convicted of a capital offense, "if it appeared by strong and pregnant evidence and circumstances that he was perfectly conscious of the nature and malignity of the crime." In an American case the same principle is thus stated: "If it shall appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted, and have judgment of death." *State v. Aaron*, 4 N. J. Law, 231, 7 Am. Dec. 592. In that case a negro boy, who was a slave, of eleven years, was convicted of murder; but a new trial was granted on account of an erroneous ruling as to the competency of a witness, and it does not appear what farther was done in the case.

In the case of *State v. Guild*, 10 N. J. Law, 163, 18 Am. Dec. 404, a negro slave, of less than twelve years, was convicted of murder; and the report of the case informs us that the defendant was executed. In that case the court dissenting from the cautious statement of the law found in 1 *Hale's Pleas of the Crown*, p. 27, permitted a conviction upon confessions. In this case, although a confession was given in evidence, the facts proved established the guilt of the accused so clearly that it is fairly inferable that no importance was attached to it by the court or jury, and its effect is not noticed in the charge. The question whether a conviction could be had upon confessions does not arise, and we do not commit ourselves to the doctrine of the decision last above cited upon that point.

All the authorities concur in maintaining the correctness of the propositions of law involved in the charge. Bishop on Criminal Law, §§ 283, 284, 285; 1 Archbold's Crim. Pl. 3, 4, 5, and notes; 1 Russell on Crimes, 3, 4, 5; Roscoe's Crim. Ev. 942, 944; Wharton's Am. Crim. Law, 51; 1 Wheeler's Crim. Cases, 231-234. Reason, humanity, and the law alike required that the court should, in its charge, throw around the jury every guard and restriction necessary to prevent an improper conviction in such a case. This has been carefully done by the court in this case, and we are bound to pronounce a full approval of the charge.

The judgment of the city court is affirmed, and its sentence must be executed.²

² Accord: When the offense charged is a misdemeanor: *Vagrancy, Commonwealth v. McKeagy*, 1 Ashm. (Pa.) 248 (1828); battery, *State v. Goin*,

SECTION 4.—INSANITY.

Nota reader, every act which a man non compos doth either concerns his life, his lands, or his goods. * * * As to his life, the law of England is that he shall not lose his life for felony or murder, because the punishment of a felon is so grievous. * * *

2. No felony or murder can be committed without a felonious intent and purpose. * * * Also, for the same reason, non compos mentis cannot commit petit treason, as if a woman non compos mentis kills her husband, as appears 12 Hen. III, "Forfeiture," 33. But in some cases non compos mentis may commit high treason, as if he kills, or offers to kill, the king, it is high treason, for the king est caput et salus reipublicæ, et a capite bona valetudo transit in omnes; and for this reason their persons are so sacred that none can offer them any violence, but he is reus criminis læsæ majestatis, et pereat unus ne pereant omnes. And it must be known that there are four manners of non compos mentis: (1) Idiot or fool natural; (2) he who was of good and sound memory, and by the visitation of God has lost it; (3) lunaticus, qui gaudet lucidis intervallis, and sometimes is of good and sound memory, and sometimes non compos mentis; (4) by his own act, as a drunkard.

Beverley's Case (1603) 4 Coke, p. 124.

McNAGHTEN'S CASE.

(House of Lords, 1843, 10 Clark & F. 200.)

Daniel McNaghten having been tried in the Central Criminal Court for the murder of Edward Drummond, the jury returned a verdict "not guilty" on the ground of insanity.

This verdict and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort having been made the subject of debate in the House of Lords, it was determined to take the opinion of the judges on the law governing such cases. Accordingly, on the 26th of May all the judges attended their lordships, but no questions were then put.

9 Humph. (Tenn.) 175 (1848); illegal sale of liquor, Commonwealth v. Mead, 92 Mass. 398 (1865).

"No person shall in any case be convicted of any offense committed before he was of the age of nine years; nor of any offense committed between the years of nine and thirteen unless it shall appear by proof that he had discretion to understand the nature and illegality of the act constituting the offense." Pen. Code Tex. art. 34.

Section 283 of the Criminal Code of Illinois fixes the age at which criminal responsibility attaches at ten years.

On the 19th of June the judges again attended the House of Lords, when (no argument having been had) the following questions of law were propounded to them.¹

Lord Chief Justice TINDALL. The first question proposed by your lordships is this: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.

Your lordships are pleased to inquire of us, secondly: "What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?" And, thirdly: "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction, and that to establish a defense on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been whether the accused at the time of doing the act knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to

¹ The questions appear in the opinion.

the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas, the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your lordships have proposed to us is this: "If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?" To which question the answer must, of course, depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.²

The question lastly proposed by your lordships is: "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any, and what, delusion at the time?" In answer thereto, we state to your lordships that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case

² Accord: As to delusion, *State v. Lyons*, 113 La. 959, 37 South. 890 (1904).

such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.³

HOTEMA v. UNITED STATES.

(Supreme Court of the United States, 1901. 186 U. S. 413, 22 Sup. Ct. 895, 46 L. Ed. 1225.)

Mr. Justice PECKHAM delivered the opinion of the court.⁴

In regard to the subject of delusion the court charged:

"There is evidence in this case tending to show that Hotema believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe were being affected by witches, and that the deaths that were occurring in the neighborhood were due to the evil influence of witches, and that the party he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant, Hotema, believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught, and that he acted upon that belief, thinking he had the right to kill the party he is charged with killing, because he thought she was a witch, but at the time he knew it was a violation of human law and he would be punished therefor, in that event it would not be an insane delusion upon the part of Hotema, but would be an erroneous conclusion, and, being so, would not excuse him from the consequences of his act; and also, if you further believe that he came to the conclusion from his investigation and understanding of the Scriptures that this party was a witch, and that the defendant also used spirituous liquors, and these two combined were the cause or causes that led him to commission of the act, and that either or both of these were the sole inducement that caused him to do the act, he would not be guiltless and would be responsible therefor. Upon the other hand, I charge you that if you should find from the evidence in this case that Solomon Hotema, the defendant, believed that there were witches, and that he had a right to kill them, and if you further find that such belief was the product of a diseased brain, or if you have a reasonable

³ The proceedings of the trial court and the opinion of Maule, J., are omitted.

"An insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and vicious resolutions, but he cannot be reasoned or persuaded into insanity or insane delusions. Whenever convictions are founded on evidence, or comparisons of facts and opinions and arguments, they are not insane delusions." Cox, J., in *Guiteau's Case* (D. C.) 10 Fed. 161 (1882).

⁴ Part of the opinion is omitted.

doubt that such condition of brain existed at the time of the homicide, and that his act was the result of such diseased brain, you will acquit him.

"In this case you are to determine the following questions:

"(1) Was the defendant, Hotema, at the time he committed the homicide charged, laboring under an insane delusion produced by an impaired brain, and did it go to the extent for the time being of controlling his will power, reflection, reason, and judgment, and was the homicide committed by reason of such insane delusion? If the proof has shown beyond a reasonable doubt that such was not the case, you will convict the defendant; but if there is a reasonable doubt as to such mental condition you will resolve such doubt in favor of the defendant and acquit him.

"(2) Did Hotema commit the homicide, not laboring under an insane delusion, but believing that by teachings of the Bible he had the right to kill the party he did kill because he thought she was a witch, and at the time of such killing he performed the same solely upon such belief, and was not laboring under an insane delusion? If you believe this state of case existed, and so believe it beyond a reasonable doubt, you will find the defendant guilty as charged in this indictment; but if you have a reasonable doubt in regard thereto you will acquit the defendant."

Upon the condition of mind of defendant regarding witches, the court held that if his belief in witches and his right to kill them were the product of a diseased brain he was irresponsible, and if the jury had a reasonable doubt on that question it should acquit. If his belief were not the product of an insane delusion, but simply an erroneous conclusion of a sane mind, he was, as the court charged, responsible.

The court, by the portions of the charge above adverted to, directed the attention of the jury to the distinction between a mere erroneous opinion and an insane delusion, the product of a diseased mind or brain. The subject is somewhat difficult, and the line of distinction not always easily drawn; but it exists, and we think that in this case the condition of mind which would render the defendant irresponsible was sufficiently and properly indicated by the court in its charge. It assumed that defendant might have formed an erroneous opinion regarding witches and witchcraft, and yet might not have been insane within the legal definition, and therefore, although possessing such erroneous ideas and acting on them, he might still be responsible criminally for his actions; and, on the other hand, if his opinion on the subject were the result of insane delusions, and he acted on them, he was irresponsible, and responsibility must be proved beyond a reasonable doubt. We think this was all the defendant could require.

The judgment must be affirmed.

COMMONWEALTH v. MOSLER.

(Oyer and Terminer of Philadelphia, 1846. 4 Pa. 264.)

The prisoner was indicted for the murder of Eve Mosler, his wife. The evidence being closed, after argument by Stokes, and Read, Attorney General, for the commonwealth, and Barnes and Barton for the defense, the jury was charged as follows:¹

GIBSON, C. J. The fact of the killing is not denied. Two points of defense have been set up: The first, that of insanity, implying an entire deprivation on the part of the prisoner of the power of self-control, and constituting a complete defense to the charge; the second, that of temporary fury induced by adequate provocation, reducing the offense to manslaughter. The first, if sustained, will acquit him altogether; the second, while acquitting him of murder, will leave him guilty of manslaughter.

Insanity is mental or moral; the latter being sometimes called homicidal mania, and properly so. It is my purpose to deliver to you the law on this ground of defense, and not to press upon your consideration, at least to an unusual degree, the circumstances of the present case on which the law acts.

A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity; but, if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defense to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will, and making the commission of the act, in his apprehension, a duty of overruling necessity. The most apt illustration of the latter is the perverted sense of religious obligation which has caused men sometimes to sacrifice their wives and children.

Partial insanity is confined to a particular subject, the man being sane on every other. In that species of madness, it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may have been laboring under a moral obliquity of perception as much so as if he were merely laboring under an obliquity of vision. A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints. On this point there has been a mistake as melancholy as it is popular. It has been announced by learned doctors that, if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws. To this monstrous

¹ Part of this case is omitted.

error may be traced both the fecundity in homicides, which has dishonored this country, and the immunity that has attended them. The law is that, whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action.

But there is a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offense. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, though aware of the heinous nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive operating in cases of this character, its recognition would destroy social order, as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of a habitual tendency developed in previous cases, becoming in itself a second nature. Now, what is the evidence of mental insanity in this particular case?

1. The prisoner's counsel rely on his behavior, appearance, and exclamations at the time of the act, or immediately after it. According to one witness, his conduct was that of reckless determination, evincing an unsound mind. "I did it," he repeated three times, it is said, like a raving maniac. But you must recollect that, to commit murder, a man must be wound up to a high pitch of excitement. None but a butcher by trade could go about it with circumspection and coolness. The emotion shown by the prisoner was not extraordinary. He seemed to know the consequences of his act—was under no delusion—and was self-possessed enough to find a reason for the act; that reason being her alleged ill treatment.

2. It is urged that the want of motive is evidence of insanity. If a motive were to be necessarily proved by the commonwealth, it is shown in this case by the prisoner's own declaration; but a motive need not always be shown. It may be secret; and to hold every one mad whose acts cannot be accounted for on the ordinary principles of cause and effect would give a general license. The law itself implies malice, where the homicide is accompanied with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief.

3. But it is said that there is intrinsic evidence of insanity from the nature of the act. To the eye of reason every murderer may seem a madman; but in the eye of the law he is still responsible.

4. His trip to Pittsburgh and voyage to Germany, it is contended, have not been accounted for, except that he expected to get property in the latter, but did not; and there is an equal obscurity about the motives of his setting fire to his wife's property—her barn, I think it was. But these things do not show any insanity connected with his crime.

The only circumstance which seems to point to a foregone conclusion is the repeated visions he had, after he started for Pittsburgh, of his wife and her granddaughter, whose throat he also attempted to cut, standing at the foot of his bed. This foreboding may tend to show a morbidness of mind in reference to this particular subject; but it is for you to say—keeping in mind the fact that, to constitute a sufficient defense on this ground, there must be an entire destruction of freedom of the will, blinding the prisoner to the nature and consequence of his moral duty—whether these circumstances raise a reasonable doubt of the prisoner's responsibility.

After an absence of two hours, the jury returned to their box with a verdict of guilty of murder in the first degree.²

STATE v. KNIGHT.

(Supreme Judicial Court of Maine, 1901. 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373.)

WHITEHOUSE, J.³ In this case the respondent was indicted and tried for the murder of Mamie Small. It was not in controversy that the accused, if responsible for his act, was guilty of murder in the first degree; and the only issue raised in defense was the insanity of the defendant. The jury returned a verdict of "guilty of murder in the first degree," and the case comes to this court on exceptions taken by the defendant to the refusal of the presiding justice to give certain instructions, and to the instructions actually given.

It is not in controversy that the instructions actually given to the jury were in entire harmony with the intellectual test of criminal responsibility approved in *State v. Lawrence*, 57 Me. 571, and cases there cited, and that the refusal to give the requested instructions was

² Accord: Holding "irresistible impulse" excuses, *Green v. State*, 64 Ark., 523, 43 S. W. 973 (1898); *State v. Johnson*, 40 Conn. 136 (1873); *State v. Cole*, 2 Pennewill (Del.) 344, 45 Atl. 391 (1899); *Allams v. State*, 123 Ga. 500, 51 S. E. 506 (1905); *Plake v. State*, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408 (1889) [*semble Fouts v. State*, 4 G. Greene (Iowa) 500 (1854)]; *Smith v. Commonwealth*, 1 Duv. (Ky.) 224 (1864); *Blackburn v. State*, 23 Ohio St. 146 (1872); *Dejarnette v. Commonwealth*, 75 Va. 867 (1881); *Butler v. State*, 102 Wis. 364, 78 N. W. 590 (1899).

³ Part of this case is omitted.

fully justified by the doctrine of that case. But it is earnestly contended by the learned counsel for the defendant that an uncontrollable insane impulse to commit a criminal act may coexist with full knowledge of the wrongfulness of the act, and that the legal test of responsibility for crime, afforded by the knowledge of right and wrong respecting the act committed, has proved to be insufficient and unsatisfactory. It is accordingly insisted that the time has now arrived when this criterion of responsibility can be safely modified by incorporating into the rule the element of irresistible impulse presented in the defendant's requests.

It is undoubtedly true that in the progressive development of the medical jurisprudence of insanity more enlightened views have gradually prevailed respecting the functional activity of the mind, and the course of symptoms indicating mental disease, and that just conclusions have more frequently been reached by courts and juries in recent years in regard to the relation of insanity to criminal responsibility. But since the announcement of the decision by this court in *State v. Lawrence*, supra, in the year 1870, this abstruse and difficult question has been the subject of exhaustive re-examination and renewed study, in the light of all modern discoveries of scientific truth bearing upon it by the most eminent medical and legal jurists in this country and England, and by courts of the highest authority in both countries; and it is still held by an overwhelming weight of judicial authority that, when the insanity of the accused is pleaded in defense, the test of his responsibility for crime afforded by his capacity to understand the nature and quality of the act he was doing, and his mental power to distinguish between right and wrong with respect to that particular act at the time he committed it, is the only proper legal criterion, and that when fully developed and explained to the jury, in its application to the special facts and circumstances of different cases, it will always be found adequate to meet the demands of justice and humanity towards the accused, as well as to insure the protection and safety of the public.

In Browne's *Medical Jurisprudence of Insanity*, published in England in 1875 and republished in this country, the author critically analyzes the famous answers given by the English judges to the questions proposed to them by the House of Lords after the trial of *McNaghten* in 1843 (sections 10-14), which have formed the basis of the prevailing rule since that time, and the one approved in *State v. Lawrence*, supra, and then proceeds as follows (section 15): "After the fullest examination of the medical opinions on the other side, we are constrained to hold that the answers of the judges are a most satisfactory statement of the law, and that no better test of responsibility could, at the present time, be devised than that which makes knowledge of right and wrong at the time of the commission of the act the means of judging of the punishability of the person who has committed a criminal offense. 'Although not a test of insanity,'

says Dr. Hammond, 'the knowledge of right and wrong is a test of responsibility. * * * Any individual having the capacity to know that an act which he contemplates is contrary to law should be deemed legally responsible and should suffer punishment. He possesses what is called by Bain punishability. * * * The only forms of insanity which in my opinion should absolve from responsibility * * * are such a degree of idiocy, dementia, or mania as prevents the individual from understanding the consequences of his act, and the existence of a delusion in regard to a matter of fact which, if true, would justify his act.'"

In the elaborate work on Medical Jurisprudence by Witthaus & Becker, published in New York in 1896, is a treatise on the Medical Aspects of Insanity in Its Relations to Medical Jurisprudence, by Dr. Fisher of New York. In that portion of the treatise devoted to Impulsive Insanity the author says (volume 3, p. 273):

"All forms of crime may be committed under the influence of irresistible impulse—homicide, suicide, arson, theft, and various acts indicative of sexual perversion. We may also have melancholia or mania associated with this condition, and more rarely delusions and hallucinations. It is not, however, in these latter conditions that we should consider this disease as an entity. In fact, the only safe course is to follow the dictum of the law in this respect, which virtually says that irresistible impulse is no defense unless a symptom of insanity."

Again, in the treatise on Mental Unsoundness in Its Legal Relation, in the same volume, by Mr. Becker, the author says, on pages 421, 422: "But evidence of the loss of control of the will, or of morbid impulse, does not constitute a defense, except when it demonstrates mental unsoundness of such a character as to destroy the power of distinguishing right and wrong as to the particular act. * * * This rule is the legal essence of the whole matter, and it avoids much of the confusion which the German jurists and metaphysicians have infused into this subject."

In the Medical Jurisprudence of Insanity or Forensic Psychiatry, by Dr. S. V. Clevenger, of Chicago, published in 1898, the author concedes that the test of right and wrong as to the particular act charged is generally accepted in the United States in determining the question of responsibility for crime (volume 2, p. 18), and abundantly justifies the concession by a vast array of "Legal Adjudications in Criminal Cases" cited in chapter 7 of the same volume.

In a very elaborate discussion of the subject by the Supreme Court of Appeals in *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224 (1892), the authorities are critically examined and compared, and the doctrine of "irresistible impulse" emphatically repudiated. In the opinion it is said: "For myself, I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible in-

nocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse, and not criminal design and guilt? * * * I admit the existence of irresistible impulse, and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override the reason and judgment, and obliterate the sense of right as to the act done, and deprive the accused of the power to choose between them. This impulse is born of the disease, and, when it exists, capacity to know the nature of the act is gone. This is the sense in which 'irresistible impulse' was defined in *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231, and *Dacey v. People*, 116 Ill. 556, 6 N. E. 165." See, also, *State v. Felter*, 25 Iowa, 67; *State v. Mewherter*, 46 Iowa, 88; *State v. Nixon*, 32 Kan. 205, 4 Pac. 159; *Ortwein v. Commonwealth*, 76 Pa. 414, 18 Am. Rep. 420; *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *U. S. v. Guiteau* (D. C.) 10 Fed. 195.

It is evident that much of the diversity of opinion or difference in modes of expression upon this subject arises from a failure to discriminate between that "irresistible impulse" produced by an insane delusion or mental disease which has progressed to the extent of dethroning the reason and judgment and destroying the power of the accused to distinguish between right and wrong as to the act he is committing, and that uncontrollable impulse which is alleged to arise from mental disease and to coexist with the capacity to comprehend the nature and wrongfulness of the act, but which may with equal reason and consistency be attributable to moral depravity and criminal perversity.

In the case at bar it has been seen that the defendant's requests do not assume the existence of an insane delusion or any mental disease sufficient to override his reason and judgment, obliterate his sense of right and wrong, and deprive him of the power to choose between them. On the contrary, they presuppose "sufficient mental capacity and reason to enable him to distinguish between right and wrong as to the particular act," and still declare him irresponsible if, by reason of mental disease, he did not have "sufficient will power to refrain from committing the act."

It is contended, in behalf of the state, that the requests present a contradictory and impossible state of mind, in thus assuming that the accused may have no insane delusions as to the act he is committing, and have full capacity and mental power to comprehend the nature and consequences of the act, to know that it was unlawful and wrong and would subject him to punishment, and yet have no power to refrain from committing it. But, whatever may eventually be declared by the great body of medical jurists to be the psychological truth in regard to the coexistence of uncontrollable impulse and such full

capacity to distinguish right from wrong in regard to the act in question, at present, without clear and conclusive proof that such a state of mind may exist, and in the absence of any satisfactory test for the discovery of its existence that would be universally applicable in the practicable administration of the criminal law, this court must adhere to the rule approved in *State v. Lawrence*, supra, which, as construed and applied in this state, has proved to be an adequate and satisfactory criterion for determining the punishability of the accused when a plea of insanity is interposed in defense.²

Exceptions overruled.

Judgment for the state.

LOWE v. STATE.

(Court of Criminal Appeals of Texas, 1902. 44 Tex. Cr. R. 224, 70 S. W. 206.)

HENDERSON, Judge. Appellant was convicted of the theft of a horse, and his punishment assessed at confinement in the state penitentiary for a term of five years.

The only question presented for our consideration is the action of the court in failing and refusing to give a charge on kleptomania; that is, a charge specially defining this species of insanity. It is conceded that the court gave a sufficient charge on insanity generally, but that kleptomania is a monomania or particular kind of insanity which should have been specially defined to the jury. In this connection we understand appellant to agree that the right and wrong test is applicable to kleptomania; that is, the disease of insanity must be such as to have deprived appellant at the time of the capacity to distinguish between the right and wrong of the particular act charged, which was theft. If this be conceded, then it would seem to our comprehension that the charge of the court is sufficient, because it lays down the "right and wrong" test as to the particular act charged, and distinctly told the jury, if at the time appellant was so diseased as not to know it was wrong to commit theft, to acquit him. However, we do not understand the definition of "kleptomania" to be as conceded by appellant's counsel. The authorities define "kleptomania" as a species of mania, consisting of an irresistible impulse to steal. See 1 Cleavenger, *Insan.* p. 177; 1 Bish. *Crim. Law*, § 388, subd. 3. Some of the books, however, regard it as a morbid propensity to steal, whether consciously or

² Accord: *People v. Owens*, 123 Cal. 482, 56 Pac. 251 (1899); *Spencer v. State*, 69 Md. 28, 13 Atl. 809 (1888); *State v. Scott*, 41 Minn. 365, 43 N. W. 62 (1889); *Cunningham v. State*, 56 Miss. 269, 21 Am. Rep. 360 (1879); *Mackin v. State*, 59 N. J. Law, 495, 35 Atl. 1040 (1896); *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584 (1886); *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1888); *State v. Levelle*, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799 (1890); *Johnson v. State*, 100 Tenn. 254, 45 S. W. 436 (1898); *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351 (1900); *State v. Lyons*, 113 La. 959, 37 South. 899 (1905); *Turner v. Territory*, 15 Okl. 557, 82 Pac. 650 (1903).

unconsciously. If kleptomania is simply an irresistible impulse to steal, regardless of the right and wrong test, then, notwithstanding it was formerly recognized as a defense in theft by the courts of this state (see *Looney v. State*, 10 Tex. App. 520, 38 Am. Rep. 616; *Harris v. State*, 18 Tex. App. 287), that doctrine has more recently been repudiated (*Hurst v. State*, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719; *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351). The writer dissented from the views of the majority of the court in those cases, but such is now the law of this state. So we hold, if the right and wrong test is applicable to kleptomania, the court gave a sufficient charge on the subject. If kleptomania is merely an irresistible impulse to steal, as the authorities seem to indicate, then it is not the law in this state, and the court was not required to give a special charge on that subject.

No error appearing in the record, the judgment is affirmed.

STATE v. JONES.

(Supreme Judicial Court of New Hampshire, 1871. 50 N. H. 339, 9 Am. Rep. 242.)

Indictment against Hiram Jones for the murder of his wife. The defendant was found guilty of murder in the first degree.

The defendant excepted to the following instructions given to the jury:

If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be "not guilty by reason of insanity," if the killing was the offspring or product of mental disease in the defendant.

Neither delusion, nor knowledge of right and wrong, nor design nor cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury.

Insanity is mental disease—disease of the mind. An act produced by mental disease is not a crime. If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty. He is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance. Insanity is not innocence, unless it produced the killing of his wife.

If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether every insane impulse is always irresistible, is a question of fact. Whether, in this case, the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact.

Whether an act may be produced by partial insanity, when no connection can be discovered between the act and the disease, is a question of fact.

The defendant is to be acquitted on the ground of insanity, unless the jury are satisfied beyond a reasonable doubt that the killing was not produced by mental disease.

The defendant was sentenced, and filed this bill of exceptions.

LADD, J.¹ The remaining and most important questions in the case arise upon the instructions given by the court to the jury, and the refusal to give instructions requested by defendant's counsel.

When, as in this case, a person charged with crime admits the act, but sets up the defense of insanity, the real ultimate question to be determined seems to be whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent.

In solving that problem, as in all other cases, it is for the court to find the law, and for the jury to find the fact. The main question for our consideration here is, what part of this difficult inquiry is law, and what part fact?

It will be readily agreed, as said by Shaw, C. J., in *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, that if the reason and mental powers of the accused are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible agent, and, of course, is not punishable for acts which otherwise would be criminal.

But experience and observation show that, in most of the cases which come before the courts, where it is sufficiently apparent that disease has attacked the mind in some form and to some extent, it has not thus wholly obliterated the will, the conscience, and mental power, but has left its victim still in possession of some degree of ability in some or all these qualities. It may destroy, or it may only impair and becloud, the whole mind; or it may destroy, or only impair, the functions of one or more faculties of the mind. There seem to be cases where, as Erskine said in *Hadfield's Case*, reason is not driven from her seat, but where distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety.

The term "partial insanity" has been applied to such cases by writers and judges, from Lord Hale to Chief Justice Shaw, where, as

¹ Part of the opinion is omitted.

has been said, "the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging"; and it is here that the difficulty of the subject begins, and that confusion and contradiction in the authorities make their appearance. "No one can say where twilight ends or begins, but there is ample distinction between night and day." We are to inquire whether a universal test has been found wherewith to determine, in all cases, the line between criminal accountability and nonaccountability—between the region of crime and innocence—in those cases which lie neither wholly in the darkness of night nor the light of day. If such a test exists, or if one can be found, it is of the utmost importance that it be clearly defined and broadly laid down, so that when it is given to a jury it may aid, rather than confuse, them. To ascertain whether a rule has hitherto been found, we must look to the authorities; and so far as we have been able to examine them the leading and familiar English cases and authorities are substantially as follows: [The learned judge here reviewed the English authorities previous to *McNaghten's Case*, and proceeded.]

The numerical preponderance of authority in England, as gathered from the cases thus far, would seem to be decidedly in favor of the rule that knowledge of right and wrong, without reference to the particular act, is the test, although their force is much shaken, if not wholly overthrown, by the qualifications which judges have seemed to feel at liberty to introduce, to meet their individual views or the exigencies of particular cases, and especially by the charge of Lord Denman in *Regina v. Oxford*.

The memorable effort of the House of Lords, in 1843, to have the confusion and conflict of opinion which had arisen on this perplexing question all cleared away by one distinct and full avowal by the judges of what the law was and should be in relation to it, is too conspicuous in the history of the subject to be passed without notice.

It may safely be said that the character of the judges and the circumstances under which the questions in *McNaghten's Case* (see note to *Regina v. Higginson*, 1 Car. & K., at page 130) were propounded to them by the House of Lords make it morally certain that if, in the nature of things, clear, categorical, and consistent answers were possible, such answers would have been given; in other words, that if a safe, practical, legal test exists, it would have been then found by those very learned men, and declared to the world. Such a result would have brought order out of chaos, and saved future generations of lawyers and judges a vast amount of trouble in trying this kind of cases. But an examination of the answers given shows that they failed utterly to do any such thing; and it is not too much to say that, if they did not make the path to be pursued absolutely more uncertain and more dark, they at best shed but little light upon its windings, and furnish no plain or safe clue to the labyrinth.

In answer to the first question, all the judges, except Maule, say

that, "notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which is meant the law of the land." Here is an entirely new element—knowledge that he was acting contrary to the law of the land; and hereupon the inquiry arises, is a man, acting under a delusion of this sort, presumed to know the law of the land? The answer must be, "Yes;" for the judges say, further on: "The law is administered upon the principle that every one must be taken conclusively to know the law of the land, without proof that he does know it."

Let this proposition be examined a moment: Knowledge that the act was contrary to the law of the land is here given as a test; that is, such knowledge is assumed to be the measure of mental capacity sufficient to entertain a criminal intent. By what possible means, it may be asked, can that test or measure be applied, without first finding out whether the prisoner in fact knew what the law of the land was? How could a jury say whether a man knew, or did not know, that an act was contrary to the law of the land, without first ascertaining whether he knew what that law was?

It was like saying that knowledge of some fact in science—as, for example, that a certain quantity of arsenic taken into the stomach will produce death—shall be the test, and at the same time saying that it makes no difference whether the prisoner ever heard of arsenic, or knows anything of its properties or not. Knowledge that the act is contrary to law might be taken as a measure of capacity to commit crime, and so might knowledge of any other specific thing that should be settled upon for that purpose, and such a test would be consistent and comprehensible, whether it were right or not; but when it is said that knowledge of a certain thing is the test, and then we are told in the next paragraph that it makes no difference whether the man ever heard of the thing or not, I confess that I am not able to see any opening for escape out of the maze into which we are led. Whether a jury would be more successful must depend, I suppose, on their comparative intelligence.

In connection with this rule, it is useful to bear in mind that Hadfield knew he was doing an illegal act, and did it for the avowed purpose of bringing upon himself the punishment which he knew was the legal consequence of the act.

Maule, J., holds that the general test of capacity to know right from wrong in the abstract is to be applied in the case supposed by the first question, the same as in any other phase of mental unsoundness.

In answer to the second and third questions, which relate to the terms in which the matter should be left to the jury, the judges say

that, "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing what was wrong."

Suppose, now, an insane man does an act which he knows to be contrary to law, because from an insane delusion (if that term amounts to anything more than the single term "insanity") he believes it to be right notwithstanding the law, that the law is wrong, or that the peculiar circumstances of the case make it right for him to disregard it in this instance; how are these two rules to be reconciled? It would seem to be plain that they are in hopeless conflict, and cannot both stand.

Maule, J., says: "The questions necessarily to be submitted to the jury are those questions of fact which are raised on the record. In a criminal trial the question commonly is whether the accused be guilty or not guilty; but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made convenient to direct their attention to. What these questions are, and the manner of submitting them, is matter of discretion for the judge—a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law"—which, he repeats, is knowledge of right and wrong. He also says there are no terms which the judge is by law required to use, only they must not be inconsistent with the law that knowledge of right and wrong is the test.

The answer to the fourth question introduces a doctrine which seems to me very remarkable, to say the least. The question was: "If a person, under an insane delusion as to existing facts, commits an offense, is he thereby excused?" To which the answer was as follows: "On the assumption that he labors under partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts, with respect to which the delusion exists, were real. For example: If, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character or fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

The doctrine thus promulgated as law has found its way into the text-books, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenious student of the law ever read it for the first time without

being shocked by its exquisite inhumanity. It practically holds a man, confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power that is required of a man in perfect mental health. It is, in effect, saying to the jury: The prisoner was mad when he committed the act but he did not use sufficient reason in his madness. He killed a man because, under an insane delusion, he falsely believed the man had done him a great wrong, which was giving rein to a motive of revenge, and the act is murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so, that would have been giving rein to an instinct of self-preservation, and would not be crime. It is true, in words, the judges attempt to guard against a consequence so shocking as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, "and is not in other respects insane"; that is, if insanity produces the false belief, which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been reached or affected by the delusion or disease. This is very refined. It may be that mental disease sometimes takes a shape to meet the provisions of this ingenious formula, or, if no such case has ever yet existed, it is doubtless within the scope of Omnipotent Power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled, and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease; that is, when we can certainly know that, although the false belief on which the prisoner acted was the product of mental disease, still that the mind was in no other way impaired or affected, and that the motive to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong. But it is a rule which can be safely applied in practice that we are seeking; and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted is at the same time produced by a spirit of revenge springing from some portion or corner of the mind that has not been reached by the disease is laying down a pathological and psychological fact which no human intelligence can ever know to be true, and which, if it were true, would not be law, but pure matter of fact. No such distinction ever can or ever will be drawn in practice, and the absurdity as well as inhumanity of the rule seems to me sufficiently apparent without further comment.

To form a correct estimate of the value of these answers, we have only to suppose that, at the end of a criminal trial where the defense is insanity, they be read to the jury for their guidance in determining the question with which they are charged. Tried by this practical test, it seems to me, they utterly fail; and the reason of the failure,

as I think, is that it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be.

It is entirely obvious that a court of law, undertaking to lay down an abstract general proposition which may be given to the jury in all cases, by which they are to determine whether the prisoner had capacity to entertain a criminal intent, stands in exactly the same position as that occupied by the English judges in attempting to answer the questions propounded to them by the House of Lords in this case; and whenever such an attempt is made I think it must always be attended with failure, because it is an attempt to find what does not exist, namely, a rule of law wherewith to solve a question of fact.

This is the only conclusion I desire to draw from the cases and text-writers referred to. It is clear to me that judges have adapted their language to the facts of the particular case before them, and that when anything is said about knowledge of right and wrong, or knowledge of the quality of the act, or any other legal test, it has been, and will inevitably continue to be, qualified and explained in such a way, to meet the evidence upon which the jury are to pass, that its character as a rule entirely disappears.

No one but the Creator of all things can look in upon the chaos of a disordered mind, and determine with certainty whether its powers are so much prostrated, enfeebled, or deranged, that the unhappy sufferer has ceased to be an accountable being. Still the court and jury must determine that question, approximately, as best they can in each individual case; and it makes no difference, so far as I can see, with the difficulty of the subject, whether Lord Brougham's view, that a distinction is to be made between the moral accountability of a man to his Maker and his accountability to human tribunals, be accepted or not. With this duty to perform, and this responsibility upon them, courts naturally and properly turn to men of science, such as have had large experience in the care and treatment of the insane, for aid; and the questions allowed to be put to experts and answered by them, both in England and this country, show that what is laid down as law in theory is almost universally treated as fact in practice.

At the trial, where insanity is set up as a defense, two questions are presented: First. Had the prisoner a mental disease? Second. If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent? The first is so purely a question of fact that no one would think of disputing it any sooner than he would dispute that it was a question of fact whether a man has consumption or not. It is in settling the second that all the difficulty arises.

The instructions asked for in this case go upon the ground that this is a mixed question of law and fact, that where there is delusion

there can be no criminal intent, and that where there is capacity to know right from wrong in reference to the particular act there is capacity to commit crime. It is true the sixth request does not present the matter in just this form; but if knowledge of right and wrong, as to the act, is to be considered a legal test of criminal accountability, it must follow that those who have such knowledge are accountable, as well as that those who have it not are not accountable. And this court is now called on, as a court of law, to decide whether either of these tests shall be adopted in this state; and, if so, which.

It would doubtless be convenient to adopt some such test. It would, to some extent, save the trouble of trying each case as it arises on its own special and peculiar facts. At any rate, it would narrow the range of investigation to a search for the facts constituting the test adopted. But in cases of this sort the argument of convenience is not to be admitted. No formal rule can be applied in settling questions which have relation to liberty and life, merely because it will lessen the labor of the court or jury. Nor ought such a rule to be adopted upon the authority of cases, unless those cases show beyond a doubt, not only its existence, but that it is founded in reason and fundamental truth. Expressions of even the most eminent judges must not be mistaken for the enunciation of a universal principle of law, when it appears that they were used in charging the jury upon the facts arising in a particular case.

The instructions given also imply that this is a mixed question of law and fact; that the only element of law which enters into it is that no man shall be held accountable criminally for an act which was the offspring and product of mental disease. Of the soundness of this proposition there can be no doubt. Thus far all are agreed; and the doctrine rests upon principles of reason, humanity, and justice too firm and too deeply rooted to be shaken by any narrow rule that might be adopted on the subject. No argument is needed to show that to hold that a man may be punished for what is the offspring of disease would be to hold that he may be punished for disease. Any rule which makes that possible cannot be law.

It will hardly be contended, I suppose, that delusion or knowledge of right and wrong with reference to the act, or any other thing can with any degree of propriety be called a legal test of the mental capacity to commit crime, unless that capacity is determined absolutely in all cases, by the presence or absence of the fact which is assumed to constitute the test.

If we speak of delusion, for instance, before that can be adopted as the test in the sense intended by the request in this case, it must appear that it makes no difference whether the delusion has any reference to or connection with the act or not. If we say, as Erskine said in *Hadfield's Case*, that delusion is the test when it appears to have produced the act, but not when it does not appear to have produced the act—that the delusion and the act should be connected—we ad-

mit that delusion cannot be a legal test, because it is not a universal test.

And even if it were established that in all cases where there is delusion there is not capacity to commit crime, with as much certainty as that a heavy body left free in the air will fall to the earth, it still remains a fact. That a heavy body will fall is a fact, although it is at the same time a law of nature. That delusion attends incapacity for crime would be a fact still, although, were the fact ascertained to be certain and universal, it might be called a law of mental disease, and might, therefore, be given to the jury as a criterion without any positive or practical wrong.

Yet, in that view, it would be the law of the land in no other sense than the laws of nature and physics may be considered laws of the land. Now, this court, sitting for the decision of questions of law, is not at liberty to receive and consider evidence or weigh and determine matters of fact.

But the very first step in the inquiry to ascertain if there be any test or criterion that may be safely given to the jury on this subject whether as a fact universally true or as a principle of law, involves the examination of an immense mass of evidence as complicated and difficult to understand as can well be conceived. Moreover, it would require a degree of skill and scientific attainment which could only be reached by years of special study and intelligent observation. Not only ought all the facts bearing on the question to be collected from every asylum for the insane throughout the world, but, as an inflexible rule is to be established, the facts of all other cases where the patient has never received scientific treatment ought to be added to the stock. Then, after collecting the facts in this way, it would be necessary to compare cases and classes of cases one with the other, to weigh facts against facts, to balance theories and opinions, and finally to deduce a result which might itself turn out to be nothing more than a theory or opinion after all. At any rate, it would be a deduction of fact.

It need not be said that this is not the business of a court of law. It is a work which can only be reasonably well done by men who devote their lives exclusively to its accomplishment. Such a work has doubtless been done, with extraordinary patience and ability, by our distinguished countryman, Dr. Ray; and the result of his laborious investigation is that no test can be found. He says: "To persons practically acquainted with the insane mind, it is well known that in every hospital for the insane are patients capable of distinguishing between right and wrong, knowing well enough how to appreciate the nature and legal consequences of their acts, acknowledging the sanctions of religion, and never acting from irresistible impulse, but deliberately and shrewdly." Ray's Med. Jurisp. Ins. § 43.

If we were at liberty to weigh and consider evidence upon the question, it is clear that such testimony must outweigh all the convenient

formulas and arbitrary dogmas laid down by lawyers and judges from the time of Lord Hale to the present, simply for the reason that Dr. Ray is qualified by study and observation to give an opinion, while lawyers and judges are not. But we do not consider evidence upon this point at all. Whether there is any universal test is as clearly a pure matter of fact, as is the question what that test may be.

In view of these considerations, we are led to the conclusion that the instruction given to the jury in this case, that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant," was right; that it fully covers the only general, universal element of law involved in the inquiry; and, therefore, that any further step in the direction indicated by the requests would have been an interference with the province of the jury, and the enunciation of a proposition which in its essence is not law, and which could not in any view safely be given to the jury as a rule for their guidance, because, for aught we can know, it might have been false in fact.

This would seem to dispose of the whole case. All the other instructions given are only the direct logical consequence of this principle.

Whether the defendant had a mental disease, as before remarked, seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of fever. That it is a difficult question does not change the matter at all. The difficulty is intrinsic, and must be met from whatever direction it may be approached. Enough has already been said as to the use of symptoms, phases, or manifestations of the disease as legal tests of capacity to entertain a criminal intent. They are all clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity. If it was, a criminal intent did not produce it. If it was not, a criminal intent did produce it, and it was crime.

The instructions as to insane impulse seem to be quite correct, and entirely within the same principle. If the defendant had an insane impulse to kill his wife, which he could not control, then mental disease produced the act. If he could have controlled it, then his will must have assented to the act, and it was not caused by disease, but by the concurrence of his will, and was therefore crime.

These instructions have now been twice given to the jury in capital cases in this state—first, by Chief Justice Perley, in *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533, and now again by Judge Doe, in the case before us. In *State v. Pike* no exceptions were taken to this part of the charge, and the questions here raised were not before the whole court for judicial determination, although they were printed

in the case as transferred, and no objection to their form is understood to have been made.

But a question was passed upon in that case which, carried to its logical results, goes far towards settling most of the questions raised upon the instructions here. It was claimed that the defendant was irresponsible by reason of a species of insanity called "dipsomania." The court instructed the jury that "whether there is such a mental disease as dipsomania, and whether the defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury." These instructions were specially excepted to by the defendant, and were held correct. This would seem to be entirely inconsistent with the idea that either delusion or knowledge of right and wrong is, as matter of law, a test of criminal capacity, and would also seem to be about equivalent to holding, in general terms, that it was for the jury to say whether the killing was the product of mental disease, and return their verdict of "guilty," or "not guilty by reason of insanity," as they found that fact to be.

We should be slow to establish any doctrine on this important subject, which we could see would be likely to result in the escape of malefactors from punishment, or afford encouragement to a fictitious defense of insanity; and no considerations of convenience or ease in the administration of the law, as before observed, should be allowed to weigh at all against adhering to any doctrine or any course of practice that rests upon sound reason, or that appears to be necessary for the attainment of right results, whether such doctrine or practice is supported by uniform authority or not.

Still it is no objection to the course of the judges who tried this case, and who tried Pike's Case, that it relieves the subject of some of its most formidable difficulties so far as the court is concerned, and, at the same time furnishes at least one clear and explicit direction which the jury can understand.

No untried or doubtful theory is adopted. The instruction given was always law, and always must be law, while justice is administered upon principles at all consonant with the calls of civilization and humanity. The only objection is that the court did not go further, and undertake to explore a region where all is doubt, uncertainty, and confusion upon the authorities, and where upon principle they had no right to go at all; that they did not undertake to lay down a rule, where, if we could allow ourselves to investigate the fact, we should probably find there is and can be no rule, nor to enunciate as law a pure matter of fact which can only be absolutely known to the Almighty.

I may add that it confirms me in the belief that we are right, or at least have taken a step in the right direction, to know that the view embodied in this charge meets the approval of men who, from great experience in the treatment of the insane, as well as careful and long study of the phenomena of mental disease, are infinitely better qualified

to judge in the matter than any court or lawyer can be. See Ray's Medical Jurisp. Ins. (5th Ed.) § 44.

The satisfaction with which the charge to the jury in *State v. Pike* is understood to have been received by the most enlightened members of the medical profession proves to my mind, not that we have thrown down old landmarks to adopt any theory based on a partial, imperfect, or visionary view of the subject, but that, in a matter where we must inevitably rely to a great extent upon the facts of science, we have consented to receive those facts as developed and ascertained by the researches and observation of our own day, instead of adhering blindly to dogmas which were accepted as facts of science and erroneously promulgated as principles of law 50 or 100 years ago.

The last instruction, that the defendant was to be acquitted on the ground of insanity, unless the jury were satisfied beyond a reasonable doubt that the killing was not produced by mental disease, was in accordance with *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154, and was correct.

Exceptions overruled.²

² "The Criminal Code of Germany, however, contains the following provision, which is said to have been the formulated result of a very able discussion both by the physicians and lawyers of that country: 'There is no criminal act when the actor at the time of the offense is in a state of unconsciousness or morbid disturbance of the mind, through which the free determination of his will is excluded.' 14 Encyc. Brit. (9th Ed.) p. 112, citing Crim. Code of Germany, § 51 (R. G. B.). The Code of France provides: 'There can be no crime or offense if the accused was in a state of madness at the time of the act.' For some time the French tribunals were inclined to interpret this law in such a manner as to follow in substance the law of England. But that construction has been abandoned, and the modern view of the medical profession is now adopted in that country." Somerville, J., in *Parsons v. State*, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193.

"Though the defense in this case is weak-mindedness, or imbecility, yet the same test—that of the ability to distinguish right from wrong in the doing of the particular act—must be applied to imbecility as well as to insanity." Sherwood, P. J., in *State v. Palmer*, 161 Mo. 152, 61 S. W. 651 (1901).

"All the modern medico-legal writers to whose writings we have had access recognize a species of mental unsoundness, connected with sleep, which they commonly treat of under the general head of 'Somnambulism.' * * * They define somnolentia 'to be the lapping over of a profound sleep into the domain of apparent wakefulness,' and say it produces a state of involuntary intoxication, which for the time destroys moral agency. * * * If, as claimed, the appellant was unconscious when he fired the first shot, it cannot be imputed to him as a crime. Nor is he guilty if partially conscious, if, upon being partially awakened, and finding the deceased had hold of him and was shaking him, he imagined he was being attacked, and believed himself in danger of losing his life or of sustaining great bodily injury at the hands of his assailant, he shot in good faith, believing it necessary to preserve his life or his person from great harm. In such circumstances it does not matter whether he had reasonable grounds for his belief or not." Cofer, J., in *Pain v. Commonwealth*, 78 Ky. 183, 39 Am. Rep. 213 (1879).

SECTION 5.—INTOXICATION.

Lastly, although he who is drunk is for the time non compos mentis, yet his drunkenness does not extenuate his act or offense nor turn to his avail, but it is a great offense in itself, and, therefore, aggravates his offense, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, as any other thing that concerns him. *Beverley's Case* (1603) 4 Coke, p. 125.

MARSHALL'S CASE.

(Lancaster Assizes, 1830. 1 Lewin, C. C. 76.)

On an indictment for stabbing, under the statute:

PARK, J., told the jury that they might take into their consideration, among other circumstances, the fact of the prisoner being drunk at the time, in order to determine whether he acted upon a bona fide apprehension that his person or property was about to be attacked.

NOTE.—In *Goodier's Case*, York Summer Assizes, 1831, PARK, J., directed the jury to the same effect.

REX v. THOMAS.

(Monmouth Assizes, 1837. 7 Car. & P. 817.)

Indictment for maliciously stabbing. It appeared that the prisoner and prosecutor were at a beer house together with several other persons. Some words passed between the prisoner and a third person, after which he was seen walking up and down the passage of the house with a sword stick in his hand, with the blade open, and was heard to say: "If any man strikes me I will make him repent it." He was desired to put up the stick, which he refused to do, and shortly after the prosecutor, ignorant of what occurred, but perceiving the prisoner was creating a disturbance, struck the prisoner twice with his fist, when the prisoner stabbed him. Several of the witnesses were cross-examined as to contrary statements before the magistrate.

PARKE, B., in summing up the case to the jury said:¹

I must also tell you that if a man makes himself voluntarily drunk that it is no excuse for any crime he may commit whilst he is so. He must take the consequence of his own voluntary act, or most crimes would otherwise be unpunished. But drunkenness may be taken into

¹ Part of the opinion not relating to intoxication is omitted.

consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So, where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse. You will decide whether the subsequent act does not furnish the best means of judging what the nature of the previous expression really was.

Verdict—Not guilty.²

KEENAN v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1862. 44 Pa. 55, 84 Am. Dec. 414.)

Error to the court of oyer and terminer of Allegheny county.

This was an indictment against Thomas B. Keenan for the murder of John A. Obey on the 5th day of July, 1862.³

Under the ruling of the court below (Sterrett, P. J.) the defendant was convicted of murder in the first degree. The case was thereupon removed into this court, where the answers of the court below to certain points which had been propounded by the counsel for the defendant were assigned for error, all of which are sufficiently presented in the opinion of this court.

LOWRIE, C. J. Our statute adopts the common-law definition of murder, and then distinguishes it of two degrees, defining the first degree specially by certain enumerated cases, and generally by the words "any other kind of willful, deliberate and premeditated killing." It is this general part of the definition that we have to apply in the present case.

A careful study of our jurisprudence on this subject clearly reveals the fact that such terms as a deliberate purpose or a deliberate and premeditated intent to kill, or a specific intent to take life, are sometimes substituted for the words of the statute; yet our reported jurisprudence is very uniform in holding that the true criterion of the first degree is the intent to take life. The deliberation and premeditation required by the statute are not upon the intent, but upon the killing. It is deliberation and premeditation enough to form the intent to kill, and not upon the intent after it has been formed. An intent

² Accord: *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484 (1858).

³ Part of this case is omitted.

distinctly formed, even "for a moment" before it is carried into act, is enough.

What the definition requires, therefore, is a distinctly formed intent to kill, not in self-defense, and without adequate provocation. It requires the malice prepense or aforethought of the common-law definition of murder to be, not a general malice, but a special malice that aims at the life of a person. This distinctly formed intent to take life is easily distinguished, in the general, from the instinctive and spontaneous reaction of mind and body against insult and injury, which is often the result of no distinctly formed intention, and also from those cases of previous and deliberate intention to kill, which may override even what, without it, would be adequate provocation given at the time of the killing.

Keeping this common understanding of the definition in mind, we shall also get clear of the influence of the cases in other states, where the terms "deliberate" and "premeditated" are applied to the malice or intent, and not to the act, and thus seem to require a purpose brooded over, formed, and matured before the occasion at which it is carried into act. Under such a definition of the intention, all our jurisprudence by which malice and intent are implied from the character of the act, and from the deadly nature of the weapon used, would be set aside; for we could not, from these, imply such a previous and deliberate, but only a distinctly formed intent, and this involves deliberation and premeditation, though they may be very brief. We should therefore blot out all our law relative to implied intent or malice, and require it to be always proved as express. And this would be a most disastrous result, for the most deliberate murderers are usually those who know how to conceal their intent until the occasion arises for the execution of it.

And, still keeping in mind our usual understanding of this general part of the definition of murder in the first degree, we are further prepared for an intelligent appreciation of the influence which the fact of intoxication may legitimately have on the degree of criminality, and in the formation of the intent to kill, and in the ascertainment of it.

The learned judge of the oyer and terminer charged the jury that the prisoner's intoxication was not such an excuse as would allow a less than ordinarily adequate provocation to palliate the offense, unless it was so great as to render him "unable to form a willful, deliberate, and premeditated design to kill," or, as he afterwards expresses the thought, "of judging of his acts and their legitimate consequences." The first of these expressions had already been very correctly and adequately explained to the jury, and the second one plainly means that, in using a deadly weapon in a deadly way, the prisoner is charged with the ordinary consequences of his acts, if he was not so drunk as to be unable to judge that such would ordinarily be the consequence of such acts. The two forms of expression are therefore the same in their meaning.

We discover no error in this instruction, and think it is in substantial accordance with all the best considered judicial precedents. And if we keep clear of the peculiarities found in other states, arising either from misapprehension or from a differently worded statute, we shall have little difficulty in recognizing its correctness.

No one pretends that intoxication is, of itself, an excuse or palliation of a crime. If it were, all crimes would, in a great measure, depend for their criminality on the pleasure of their perpetrators, since they may pass into that state when they will. But it is argued that, because intoxication produces a state of mind that is easily excited by provocation, therefore the crimes committed under such intoxication and provocation are less criminal than when committed in a state of sobriety under the same provocation. We are very sure that no statute will ever announce such a rule, and that we are not authorized to announce it in interpreting this statute.

Stated in its most general form, it amounts to this: That, because the mind usually receives provocation with an intensity proportioned to its own excitement or excitability, therefore the act of provocation must be measured, not by its own character and its ordinary effect, but by the state and habit of the mind that receives it. Then, measured by this rule, the crimes of a proud, or captious, or selfish, or habitually ill-natured man, or one who eats or fasts too much, or of one who is habitually quarrelsome, covetous, dishonest, or thievish, or who, by any sort of indulgence, fault, or vice, renders himself very easily excitable, or very subject to temptation, are much less criminal than those of a moderate, well-tempered and orderly citizen, because to the former a very small provocation or temptation becomes adequate to excuse or palliate any crime. If such were the rule, a defendant would be much more likely to injure than to benefit his case by showing a good character, and the law would present no inducement to men to try to rise to the standard of even ordinary social morality.

Of course, it is impossible that such a principle can be a rule of law. If it were admitted, it could not be administered; for no judicial tribunal can have time or competence for such a thorough investigation of the special character or state of each individual mind as the rule requires, and therefore it would necessarily jump to a conclusion, such as the caprice or prejudice or other influence of the moment would dictate.

The prisoner was somewhat intoxicated when, with six or seven companions, he entered the passenger car, and he and they seem to have behaved badly and noisily, and used very profane language there, so that several persons preferred walking and left the car. Though they were twice requested by the conductor to be quiet, the prisoner used abusive and threatening language in reply, and his companions and he persisted in their ill conduct, and he expressed his determination to remain. Then the conductor took him by the lapel of his coat and was proceeding to put him out, when he struck the conductor and was

struck in return, and then his companions joined in the scuffle, and he drew a knife and by several strokes of it mortally wounded the conductor.

It is to such evidence as this that the judge's charge relates, and it seems to be entirely relevant, adequate, and correct, and free from any invasion of the functions of the jury. And we say this with special reference to those parts of the charge which say that the prisoner ought to be taken to have intended the natural and usual consequences of the act of using the knife in the way he did; that the conductor had a right to put out a passenger so misbehaving; that the prisoner's resistance and the blow struck by him were his own provocation of the struggle in which he used the knife, and neither the struggle nor the blow received in return can be any excuse for its use. None of the other points need any special notice. Nor do we find any error in impaneling the jury or in the admission or rejection of evidence. We have considered the prisoner's case with all the caution and concern which its terrible penalties are calculated to inspire, and it is with much sorrow, on his account, that we are compelled to say that we discover no valid ground for granting him a new trial.

Sentence affirmed and record remitted.²

FLANIGAN v. PEOPLE.

(Court of Appeals of New York, 1881. 86 N. Y. 554, 40 Am. Rep. 556.)

Error to the General Term of the Superior Court of the city of Buffalo, to review judgment entered upon an order made July 23, 1881, which affirmed a judgment of a Criminal Term of said court, entered upon a verdict convicting the plaintiff in error of the crime of murder in the first degree.

The plaintiff in error was indicted for the murder of one John Karins. It appeared by the evidence that the deceased kept a boarding house for laborers upon a railroad, and also was foreman or boss. The prisoner boarded with Karins, and had formerly been at work under him, but about three months before the murder Karins caused him to be discharged. The prisoner went to Karins' room about 10 or 11 p. m., and stabbed him while he was asleep. The prisoner was in the habit of drinking to excess, and was frequently intoxicated. He had been drinking heavily on the day of the murder.³

MILLER, J. It is claimed that the judge erred upon the trial in refusing to charge, as requested by the prisoner's counsel, "that, from all the evidence in the case, the jury may believe, if they see fit, that

² Accord: *People v. Williams*, 43 Cal. 344 (1872). Cf. *Haile v. State*, 11 Humph. (Tenn.) 154 (1850).

³ Part of this case is omitted.

the prisoner may have been the victim of an appetite for drink, entirely overcoming his will, and amounting to a disease, and that, if they so believe, they must acquit the prisoner, unless they believe, beyond a reasonable doubt, that the act was not committed while his mind was overwhelmed by the effects of the liquor so taken." The proposition contained in this request was to the effect that the jury were authorized to believe that the prisoner was the subject of an appetite for intoxicating drinks, which entirely controlled his will, and to the extent of becoming a disease, and that he was not responsible unless the crime was committed while he was not under the influence of such disease.

The effect of this proposition would be to excuse the prisoner from the consequences of the crime committed, if he was laboring under intoxication so that his will was overcome, and not under his control at the time; in other words, that drunkenness, if carried to the extent of producing incapacity to control the action of the mind and will of the prisoner, would be an excuse for the crime committed.

The rule is well settled that voluntary intoxication of one who, without provocation, commits a homicide, although amounting to a frenzy, does not exempt him from the same construction of his conduct, and the same legal inferences, upon the question of intent as affecting the grade of his crime, which are applicable to a person entirely sober. *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484.

Within the rule laid down in the case cited, we think that the request to charge cannot be sustained. The position of the learned counsel for the prisoner is that he had a right to go to the jury upon the question whether intoxication was a disease, as described in the request, and whether the prisoner was afflicted with it, and, if the jury found both of these facts, the drunkenness could not have been voluntary, and, if the jury believed the mind was overwhelmed by means thereof, that the prisoner must be excused as an insane man. It may be answered that no such distinct request was made; but, aside from this, the position taken would be adverse to the principle which has been established by a long series of decisions, and, if enforced, might lead to exonerate offenders for crimes committed by them when under the influence of intoxicating drinks, and thus furnish an excuse for the commission of the most heinous offenses. The authorities all agree upon the proposition that mental alienation, produced by drinking intoxicating liquors, furnishes no immunity for crime, and, to sustain the doctrine asserted, it would be necessary to overrule this well-established principle. The proposition contained in the request was also objectionable, as it assumed that, if the prisoner had become the victim of an appetite for strong drinks, so as to overcome his will, and amounting to a disease, even although he was able to distinguish between right and wrong at the time of, and with respect to, the act committed, he should be acquitted. *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731.

The finding of the jury that the prisoner was affected with the alleged disease would not exonerate him from responsibility for the crime, and his intoxication did not authorize the court to charge as requested.

No error was, therefore, committed in the refusal of the judge to grant the request, nor was there any error in the refusal of the judge to charge, as requested, that the jury might "take into consideration the fact of drunkenness as affecting each of the questions of deliberation and premeditation."

The question presented by this request has been the subject of consideration in the reported decisions in the courts of this state. In *People v. Rogers*, supra, a request was made by the prisoner's counsel to charge the jury to the effect that drunkenness might exist to such a degree that neither an intention to murder nor a motive for the act could be imputed to the prisoner. The request was refused, and Denio, J., in discussing the question, says: "This would be precisely the same thing as advising them that they might acquit of murder on account of the prisoner's intoxication, if they thought it sufficient in degree. It has been shown that this would be opposed to a well-established principle of law." He further remarks: "The judge ought to have charged that, if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so, and that he must take the consequences of his own voluntary act." The doctrine thus laid down in principle would sustain the refusal of the judge to charge as requested in the case at bar. In *Kenny v. People*, 31 N. Y. 330, the prisoner was convicted of murder in the first degree, committed while in a state of voluntary intoxication, upon a sudden impulse. The court instructed the jury that voluntary intoxication can furnish no excuse or immunity for crime, and so long as the offender is capable of conceiving a design he will be presumed, in the absence of contrary proof, to have intended the natural consequences of his own acts. The judge was requested to charge, among other things, that intoxication may be considered in determining whether the homicide was committed by a premeditated design, which was refused, and it was held by this court that there was no error in declining to charge as requested, and Potter, J., cites from *People v. Rogers* the remarks we have already quoted from the opinion in that case, and says that "*People v. Rogers*, and the opinions delivered therein and the authorities cited, are conclusive, and control this case." He further remarks that "the rule established in that case, and, in fact, the uniform rule in all the cases, is that, where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime." This case is directly in point in regard to the subject of premeditation, and the principle laid down would seem to cover deliberation also. As, however, the judge subsequently, in response to a request made by the prisoner's counsel to the effect that

the jury might take into consideration the question of drunkenness as affecting the fact of deliberation, said that he had so charged, and had left it to the jury to determine as to the degree of murder and whether there was deliberation, and thus allowed the jury to consider the intoxication of the prisoner in reference to deliberation, it is not necessary to determine the question whether the refusal to charge as to deliberation was erroneous.

The judge also charged, in response to a request of the prisoner's counsel, that, if the jury believed that the prisoner was under the influence of liquor or drink at the time of the commission of the act, they might take into consideration the drunkenness of the prisoner, as to whether it did not render more weighty the presumption of his having yielded to sudden passion rather than to previous malice. In an earlier portion of his charge, he stated that premeditation and deliberation was essential to establish murder in the first degree, and the entire charge on the question discussed was quite as favorable to the prisoner as the evidence warranted. The evidence was quite clear as to the intention of the prisoner, and to sanction a rule that his drunkenness was an excuse would be adverse to the whole current of authority and what has been understood to be well-established law.

The judgment should therefore be affirmed, and the record remitted to the court below, with directions to proceed as required by law. All concur.

ANDREWS, J., entertained some doubt upon the point whether the court did not err in refusing to charge that the jury might consider the fact of drunkenness upon the point of premeditation, as well as upon the point of deliberation.

Judgment affirmed.

STATE v. HAAB.

(Supreme Court of Louisiana, 1901. 105 La. 230, 29 South. 725.)

NICHOLS, C. J. In this case, defendant, Fred. H. Haab, indicted for murder, convicted of manslaughter, and sentenced to imprisonment for six years at hard labor in the penitentiary, has appealed from the sentence rendered, upon a number of grounds embodied in bills of exception and assignment of error, which we have examined with great care.¹

We think that the evidence disclosed that for some time previous to the homicide, at the time of the homicide, and up to the time of his arrest, the accused had been continually drinking heavily and getting drunk; that he was drunk at the time of the homicide. It is claimed for the defense that during this whole period the condition of his mind was such as to render him unable to distinguish right from wrong, and

¹ Part of the opinion is omitted.

that his long continuance in excessive drinking had brought him into such a condition that he was unable to resist drinking and getting drunk; that his condition of mind was such as to give rise to delusions on his part that he was about to be attacked and killed.

It is claimed that during this long debauch he had delirium tremens, also at some time prior to the homicide. It is claimed that there was evidence to show that he was in fact crazy or insane at the time of the homicide, and that, though this was the result of heavy drinking, the accused was, nevertheless, excusable for the homicide.

Referring to one of the special charges requested by the accused, wherein reference is made to a person being first crazy, and then getting drunk, and while "crazy drunk" committing homicide, the court said: "No evidence supports this charge. The accused was never deranged before this particular spree, nor after. It was one continuous debauch, beginning, according to his witnesses, about six weeks before the homicide, while the alleged insanity appeared about two weeks before the homicide. After the killing the accused recovered in a few days. Drunkenness pre-existed the alleged insanity." The judge further said that he had, in his general charge, announced the principles of law declared in that charge, though he did not think it applied to the defendant's case. He did charge that "if the intoxication was the result of pre-existing insanity, and the accused, by reason of such pre-existing insanity, could not overcome his desire to gratify his thirst for drink, then such insanity would be the actuating cause of the crime, and the jury should so consider it. If, however, his excessive indulgence in liquor was caused by his own negligence, and he had an opportunity of correcting his weakness, and failed to do so, he is responsible for the results of his own excesses, accordingly as you have been instructed in this charge—that is, if a temporary result, he would be responsible; if a permanent result, he would be irresponsible."

The district judge, at the foot of the bill of exceptions taken by the accused to his refusal to give to the jury the special charge that "the law recognizes the existence of a form of diseased mind known as delirium tremens, induced by the excessive use of stimulating drink, and in the event of a homicide committed by one laboring under such disease to a degree that dethrones reason and prevents him from knowing the difference between right and wrong, such homicide would be excusable, although such mental disease was not permanent, and was due to the excessive drinking of alcoholic stimulants," made the following statement, evidently intended for the Supreme Court's consideration, and not that of the jury:

"If Haab's condition at the time he fired the fatal shot could be properly designated as delirium tremens (which I deny), it must be shown to be:

"(1) A fixed, settled, or permanent condition, and not a temporary one, as in this case. If a man voluntarily drinks to excess, tempo-

The proposed charge is, that the accused was afflicted with delirium tremens, a permanent condition, at the time he fired the fatal shot, and that this condition was induced by the excessive use of stimulating drink, and that in the event of a homicide committed by one laboring under such disease to a degree that dethrones reason and prevents him from knowing the difference between right and wrong, such homicide would be excusable, although such mental disease was not permanent, and was due to the excessive drinking of alcoholic stimulants.

rarily destroying his mental soundness to such an extent as not to know the difference between right and wrong, and while in this condition commits an unlawful homicide, his act is inexcusable, whether you designate his mental condition as simple drunk, drunk to stupefaction, crazy-drunk, or insane dementia, or delirium tremens. The temporary character of his affection makes him responsible. A state of disease brought about by a person's own act, as delirium tremens caused by excessive drinking, is no excuse for committing a crime, unless the disease so produced is permanent. Withaus & Beeker, vol. 3, page 491; 1 Hale, P. C. 32; 4 Black, 26; State v. Kraemer, 49 La. Ann. 774, 22 South. 254, 62 Am. St. Rep. 664. This is the common law.

"(2) It must also be shown that the delirium tremens was not the immediate product of excessive drinking, but a remote consequence of it. The facts are that Haab's mental condition may have been unsound at the time of the homicide, but was the immediate result of his undue indulgence in spirituous liquors, and not the result of any previous sprees or drunkenness; that after the killing he was jailed, and recovered in five or six days permanently. Under this state of facts the court declined to make any distinctions with reference to his unsound condition of mind. If he was merely 'crazy drunk,' as it is vulgarly called, he would be just as much entitled to an acquittal, if he could not tell the difference between right and wrong, as he would be if his condition was designated as a delirium.

"Criminal indulgence in the use of spirituous liquors would be the basis of both conditions."

Under other bills the court said:

"There was no evidence to show that delusion in this case was occasioned by a 'fixed' frenzy. There was nothing 'fixed' in defendant's mental condition. The evidence shows that his alleged mental derangement as a fact was temporary, and was created by the excessive use of spirituous liquors. The delusions, if any, were incidents to the excessive drinking. As to the statement that this accused was both drunk and insane: This phraseology may be misleading. It may imply there was evidence to show that the alleged insanity and drunkenness were two separate and distinct conditions proceeding from different causes. There was no evidence in support of such a fact. The evidence showed that Haab's symptoms, whatever they were, proceeded from one and the same cause, and were its immediate and connecting effects, differing only in degree. Naturally, the continued use of spirituous liquors on one debauch without interruption, as in this case, would intensify each succeeding effect. A man who becomes 'crazy drunk' reaches this condition by stages."

Referring to one of the charges requested, but refused, the court said:

"It failed to distinguish between a mental unsoundness, the immediate result of excessive drink, and one by long-continued habit, a re-

remote consequence of it. If one should become voluntarily drunk in the morning, indulging to such excess during the day as to lose all power of controlling the desire for drink, and continuing his excesses at night, until drunk to madness, and in this condition should unlawfully slay another, such killing, under the charge requested, would be excusable."

In his reasons for refusing a new trial the judge said:

"The accused began drinking immoderately, and was under the influence of liquor to a greater or less degree continually and without intermission for two weeks before the homicide, until its effects wore off, after his arrest and incarceration, when he ceased drinking. It makes no difference by what terms you designate the temporary effects of his excesses, whether called an ordinary drunk, drunk to stupefaction, delirium tremens, drunk to frenzy, insanity, etc., if it were the immediate product of this particular debauch, he is responsible for his acts under its influence. There was no evidence whatever that Haab's condition was a remote consequence of long-continued prior excesses, nor that he had ever been in this condition before. In the opinion of the court, at the time of the firing of the fatal shot Haab was not suffering from delirium tremens. He was merely afflicted with that nervousness that always accompanies immoderate indulgence in liquor."

We have referred to *United States v. Drew*, cited by counsel, and reported in 5 Mason (U. S.) 29, Fed. Cas. No. 14,993. The accused upon an admitted state of facts was declared insane and discharged. In the course of his opinion in the case, Judge Story used the following language:

"In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is when the crime is committed by a party while in a state of intoxication; the law not permitting a man to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take and be the immediate result of a fit of intoxication, and while it lasts, and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party arising from gross and habitual drunkenness. However criminal, in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while defendant was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offense. The law looks to the immediate and not to the remote cause—to the actual state of the party, and not to the causes which remotely caused it.

"Many species of insanity arise remotely from what, in a moral view, is a criminal negligence or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such immunity has always been deemed a sufficient excuse for any crime done under its influence."

We think it fairly appears from the recitals of the accused and those of the judge that the accused was in a state of intoxication at the time of the homicide, and that his mental condition at that time, whatever it might be, was the immediate and direct result, and not the remote result, of voluntary drunkenness. When we say direct and immediate result, we mean to say that it arose during a condition of drunkenness and pending a single, continuing, voluntary, drunken debauch, which at its origin started with the accused in a condition of sanity. The results were in a legal sense immediate and direct results, though the beginning of the drunken debauch may have dated some days back, or even some weeks before the homicide.

We think, under the recitals in the case, that it is precisely such a one as Mr. Justice Story refers to in which he says: "Insanity, or a condition of mind substantially that of insanity, would not serve as a shelter or a protection against crime."

We think that this was the view taken by the district judge of the fact and law of the case, a view which he endeavored to place before the jury in his charge. We think he fairly advised the jury as to the law, though there were some expressions in his charge which he might well have omitted, as they doubtless did not instruct, and may perhaps have to some extent confused, the jury. We do not think, however, they were led into error or misled by these expressions, or that they were prejudicial. It is well for a judge, charging a jury as to insanity, to avoid as far as possible the use of technical medical terms as to the various forms and shades of mental disease.

They are not likely to enlighten or impress the jury, and are very liable to technical objections.

We do not think there is any ground for the reversal of the judgment, and it is hereby affirmed.

Rehearing refused.

"The insanity set up as a defense in this case is not hereditary or natural, but voluntary, in the sense of having originated from the use of drugs. While this is an unfortunate and unhappy condition, the law does not, and cannot, regard it with the same leniency that it does cases of adventitious insanity, not caused by the act of the party himself. Parties who persist in subjecting themselves to the persistent use and habit of taking alcoholic drink, or other poisonous compounds and drugs, cannot expect the same forbearance and immunity from punishment as those bereft of reason by the act of God. It is admissible and proper to show the immoderate use of drugs or whiskey, not to excuse crime, but to illustrate the mental condition, with a view to fixing the degree of the crime as it depends upon deliberation and cool, malicious purpose." *Wills, J., in Wilcox v. State*, 94 Tenn. 122, 28 S. W. 312 (1894). But see *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351 (1900).

WHITTEN v. STATE.

(Supreme Court of Alabama, 1896. 115 Ala. 72, 22 South. 483.)

COLEMAN, J. The defendant was indicted and convicted for an assault with intent forcibly to ravish. There was evidence introduced on the trial to show that at the time of the misconduct of the defendant he was sober, and there was evidence tending to show that he was drunk. On this phase of the evidence the defendant requested the court to give the following charge: "The presumption in this case is that the defendant is innocent until the state has proven beyond all reasonable doubt that he is guilty; and if the jury have a reasonable doubt, growing out of all the evidence, as to whether he was sufficiently sober to form the specific intent to ravish, then the jury cannot find the defendant guilty of an assault with intent to ravish." This charge was refused. We are of opinion the charge should have been given. In order to convict under the statute for an assault with intent to ravish, it is necessary to satisfy the jury beyond a reasonable doubt that the defendant entertained the specific intent charged and made the assault to accomplish the specific purpose. Mere drunkenness does not excuse or palliate an offense, but it may produce a state of mind which incapacitates the party from forming or entertaining a specific intent. If the mental condition is such that a specific intent cannot be formed, whether this condition is caused by drunkenness or otherwise, a party cannot be said to have committed an offense a necessary element of which is that it be done with a specific intent.¹

The condition of the defendant's mind arising from his voluntary drunkenness was no excuse for the assault, an offense included in that charged. It can only be considered upon the question of his guilt of the statutory offense for which he was indicted, to wit, an assault with intent to forcibly ravish, which involves the condition of the defendant's mind. *Engelhardt v. State*, 88 Ala. 100, 7 South. 154.

Reversed and remanded.²

¹ Part of the opinion is omitted.

Accord: Assault with intent to murder, *Crosby v. People*, 137 Ill. 325, 27 N. E. 49 (1891); attempt, *Reagan v. State*, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833 (1889); bribery, *White v. State*, 103 Ala. 72, 16 South. 63 (1893); burglary, *State v. Bell*, 29 Iowa, 316 (1870); *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809 (1897); conspiracy, *Booher v. State*, 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391 (1901); forgery, *People v. Blake*, 65 Cal. 275, 4 Pac. 1 (1884); larceny, *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13 (1879); *Chatham v. State*, 92 Ala. 47, 9 South. 607 (1890).

² "It appeared from the evidence that the defendant was addicted to the habitual and excessive use of opium in some of its forms, and there was evidence from which it might be inferred that at the time of the supposed larceny he had been deprived of his accustomed supply of the drug. He sought to prove by competent testimony what effect such deprivation would have upon his mental condition, but the evidence was rejected. We think the evidence was competent, as tending to show whether or not he was, at the time, in a condition mentally such as to be able to commit a larceny. The judgment is reversed." *Worden, J., in Rogers v. State*, 33 Ind. 545 (1870).

SECTION 6.—INCORPORATION.

ANONYMOUS.

(King's Bench, 1702. 12 Mod. 559.)

Note.—Per *HOLT*, Chief Justice. A corporation is not indictable, but the particular members of it are.

UNITED STATES v. JOHN KELSO COMPANY.

(United States District Court for California, 1898. 86 Fed. 304.)

DE HAVEN, District Judge. On October 9, 1897, there was filed in this court by the United States district attorney for this district an information charging the defendant, a corporation, with the violation of "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August 1, 1892 (27 Stat. 340, c. 352 [U. S. Comp. St. 1901, p. 2521]; 2 Supp. Rev. St. p. 62). Upon the filing of this information, the court, upon motion of the district attorney, directed that a summons in the general form prescribed by section 1390 of the Penal Code of this state, be served upon said corporation, and accordingly on said date a summons was issued, directing the defendant to appear before the judge of said court in the courtroom of the United States District Court for this district on the 21st day of October, 1897, to answer the charge contained in the information. The summons stated generally the nature of the charge, and for a more complete statement of such offense referred to the information on file. On the day named in said summons for its appearance, the defendant corporation appeared specially by its attorney, and moved to quash the summons, and to set aside the service thereof, upon grounds hereinafter stated. Upon the argument of this motion it was claimed in behalf of the defendant: First, that the act of Congress above referred to does not apply to corporations, because the intention is a necessary element of the crime therein defined, and a corporation as such is incapable of entertaining a criminal intention; second, that, conceding that a corporation may be guilty of a violation of said act, Congress has provided no mode for obtaining jurisdiction of a corporation in a criminal proceeding, and for that reason the summons issued by the court was unauthorized by law, and its service a nullity. It will be seen that the first objection goes directly to the sufficiency of the information, and presents precisely the same question as would a general demurrer, attacking the information on the ground of an

alleged failure to charge the defendant with the commission of a public offense. This objection is one which would not ordinarily be considered upon a motion like that now before the court, when the party making the objection refuses to acknowledge the jurisdiction of the court, or to make any other than a special appearance for the purpose of attacking its jurisdiction; but, in view of the conclusion which I have reached upon the second point urged by the defendant, it becomes necessary for me to determine whether the act of Congress above referred to is applicable to a corporation, and whether a corporation can be guilty of the crime of violating the provisions of said act. Section 1 of that act makes it unlawful for a contractor or subcontractor upon any of the public works of the United States, whose duty it shall be to employ, direct, or control the services of laborers or mechanics upon such public works, "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." And section 2 of the act provides "that * * * any contractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any public works of the United States * * * who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof." It will be observed that by the express language of this statute there must be an intentional violation of its provisions, in order to constitute the offense which the statute defines. In view of this express declaration, it is claimed in behalf of defendant that the act is not applicable to corporations, because it is not possible for a corporation to commit the crime described in the statute. The argument advanced to sustain this position is, in substance, this: That a corporation is only an artificial creation, without animate body or mind, and therefore, from its very nature, incapable of entertaining the specific intention which, by the statute, is made an essential element of the crime therein defined. The case of *State v. Manufacturing Co.*, 20 Me. 41, 37 Am. Dec. 38, supports the proposition that a corporation is not amenable to prosecution for a positive act of misfeasance, involving a specific intention to do an unlawful act, and it must be conceded there are to be found dicta in many other cases to the same effect. In a general sense, it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act—that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better-considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted when, in its corporate capacity

and by direction of those controlling its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act should be done is imputed to the corporation itself. *State v. Railroad Co.*, 23 N. J. Law, 360; *Reg. v. Great North of England Ry. Co.*, 58 E. C. L. 315; *Commonwealth v. Proprietors*, 2 Gray (Mass.) 339. See, also, *State v. Railway Co.*, 15 W. Va. 380, 36 Am. Rep. 803. That a corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element is not disputed at this day. Thus an action for malicious prosecution will lie against a banking corporation. *Reed v. Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Goodspeed v. Bank*, 22 Conn. 530, 58 Am. Dec. 439. An action will lie also against a corporation for a malicious libel. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202, 16 L. Ed. 73; *Maynard v. Insurance Co.*, 34 Cal. 48, 91 Am. Dec. 672. The opinion in the latter case, delivered by Currier, C. J., is an able exposition of the law relating to the liability of corporations for malicious libel, in the course of which that learned judge, in answer to the contention that corporations are mere legal entities, existing only in abstract contemplation, utterly incapable of malevolence, and without power to will good or evil, said:

"The directors are the chosen representatives of the corporation, and constitute, as already observed, to all purposes of dealing with others, the corporation. What they do, within the scope of the objects and purposes of the corporation, the corporation does. If they do any injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."

The rules of evidence in relation to the manner of proving the fact of intention are necessarily the same in a criminal as in a civil case, and the same evidence which in a civil case would be sufficient to prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law. Of course, there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder, and other offenses, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation—as, for instance, a fine. In the act of Congress now under consideration it is made an offense for any contractor or subcontractor, whose duty it

shall be to employ, direct, or control any laborer employed upon any of the public works of the United States, to require or permit such laborer to work more than eight hours in any calendar day. A corporation may be a contractor or subcontractor in carrying on public works of the United States, and as such it has the power or capacity to violate the provision of this law. Corporations are, therefore, within the letter, and, as it is as much against the policy of the law for a corporation to violate these provisions as for a natural person so to do, they are also within the spirit, of this statute; and no reason is perceived why a corporation which does the prohibited act should be exempt from the punishment prescribed therefor. If the law should receive the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to a natural person. Such an intention should not be imputed to Congress, unless its language will admit of no other interpretation.¹

The motion of the defendant will be denied.²

¹ Part of the opinion involving another point is omitted.

² Accord: *Nuisance, Northern Cent. Ry. Co. v. Commonwealth*, 90 Pa. 300 (1879); contempt of court, *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280 (1899). Contra: As to misfeasance, *State v. Railroad*, 23 Ind. 362 (1864).

CHAPTER VI.

THE CRIMINAL ACT.

SECTION 1.—CONCURRENCE OF ACT AND INTENT.

REGINA v. MATTHEWS.

(Court of Criminal Appeal, 1873. 12 Cox, C. C. 489.)

BOVILL, C. J.¹ We have considered this case, and have come to the conclusion that the conviction must be quashed. The jury have found that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. But at the same time they have found that at the time of finding the heifers the prisoner did not intend to steal them, but that the intention to steal came on him subsequently to the first interview with Stiles. That being so, the case is undistinguishable from *Reg. v. Thurborn*, 3 Cox, C. C. 453, and the cases which have followed that decision. Not having any intention to steal when he first found them, the presumption is that he took them for safe custody, and unless there was something equivalent to a bailment afterwards he could not be convicted of larceny. On the whole, we think there was not sufficient to make this out to be a case of larceny by a bailee.

Conviction quashed.

MILTON v. STATE.

(Supreme Court of Florida, 1898. 40 Fla. 251, 24 South. 60.)

MADRY, J.² The following instruction given by the court to the jury was excepted to by defendant, viz.: "If you believe from all the testimony in this case that the defendant was informed that in a certain house an offense was being committed against the ordinances of the city of Tampa, and that the defendant was a policeman of the city of Tampa at the time, then it was his duty, and it was lawful, if not resisted, for him to go into said house for the purpose of preventing, or arresting those who might in his presence be guilty of

¹ The opinion only is printed.

² Part of the opinion is omitted.

a violation of the ordinances of said city; but if you believe from all the evidence in this case that he went to that house in good faith as an officer of the law to enforce the law, and after he got in there violated the law himself, then the law removes its sanction to such entry, and he becomes a trespasser from the beginning." This charge is not correct, and we find no authority to sustain it. The circuit judge must have failed to observe the distinction obtaining in the civil and criminal departments of the law in the application of the rule sought to be invoked in the charge. Mr. Bishop says (1 Crim. Law [8th Ed.] § 208): "In civil jurisprudence we have the rule that when a man does a thing by permission of law—not by license, but by permission of law—and, after proceeding lawfully part way, abuses the liberty the law had given him, he shall be deemed a trespasser from the beginning by reason of this subsequent abuse. But this doctrine does not prevail in our criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterwards adds either the act or the intent, yet not the two together." The cases cited, *State v. Moore*, 12 N. H. 42, and *Commonwealth v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375, sustain the text.

The judgment is reversed, and a new trial awarded.

REGINA v. SUTTON.

(Court for Crown Cases Reserved, 1838. 2 Moody, 29.)

The prisoner was tried before Mr. Baron Alderson at the Spring Assizes for the county of Gloucester, 1838, upon an indictment which contained two counts: First, for stealing a sheep; secondly, for killing the same with intent to steal the carcass.

The jury found the prisoner guilty upon the latter count only.

It appeared that the prisoner was interrupted by the prosecutor, who came into his field whilst the prisoner was in the act of killing the sheep. The sheep, however, had only been wounded in the throat; the jugular vein being cut on one side of it, but not altogether through. The animal was immediately removed by the prosecutor to his own house, and the wound sewed up; but it died in two days.

The jury found the prisoner had given to the sheep a deadly wound, of which it died two days after, with intent to steal the carcass.

Upon these facts the learned Baron directed them to find a verdict of guilty upon the second count. See *Clay's Case*, R. & R. 387.

In Easter Term, 1838, Lord DENMAN, C. J., TINDAL, C. J., Lord ABINGER, C. B., PARK, J., LITLEDALE, J., PARKE, B., BOLLAND, B., BOSANQUET, J., ALDERSON, B., PATTESON, J., COLERIDGE, J., and COLTMAN, J., considered this case, and unanimously held the conviction right.

PINKARD v. STATE.

(Supreme Court of Georgia, 1860. 30 Ga. 757.)

The plaintiff in error was indicted and found guilty of simple larceny. He moved for a new trial on the following grounds: (4)¹ Because the court erred in refusing to charge the jury, as requested by the counsel for defendant in writing, that if they, the jury, believe from the evidence that Pinkard, the defendant, did agree with Perry and Axon to steal the negro woman belonging to Brinsfield, yet if they believe that Pinkard abandoned the purpose, and went off and did not participate in the crime, then the jury must find the defendant not guilty.

LUMPKIN, J. We think the fourth charge should have been given. The law as well as the gospel allows a place of repentance, and, notwithstanding the accused may at one time have agreed to engage in this crime, yet, if he afterwards changed his mind and abandoned that intention, he is not guilty; and there was proof in that case to warrant a charge to that effect.

SECTION 2.—SUFFICIENCY OF THE ACT.

I. SOLICITATION.

BACON'S CASE.

(King's Bench, 1664. Lev. 146.)

He was indicted for intending to murder the Master of the Rolls, and for offering £100 to J. S. to do it; and saying, 'That, if he would not, he would do it himself; and he being convicted, it was moved that this intent only was not indictable: But the Court to the contrary said: "Anciently the will was reputed or taken for the deed in matters of felony, and tho' it is not so now, yet it is an offense and finable; and they fined him 1000 marks, three months' imprisonment, and to find sureties of good behavior during life."²

¹ Part of this case is omitted.

² "In some Year Books of the fourteenth century we find our lawyers appealing to a * * * dangerous maxim, '*Voluntas reputabitur pro facto.*' See Coke, Third Instit. 5; 2 Stephen, Hist. Crim. Law, 222. This was, we believe, due to the fact that, owing to the disuse of appeals, our criminal law had become far too lenient in cases of murderous assaults which did not cause death. We * * * believe that the adoption, even for one limited purpose, of this perilous saying was but a momentary aberration. Our old law started from the other extreme: '*Factum reputabitur pro voluntate.*'" 2 Pollock & Maitland's Hist. Eng. Law, p. 475, note.

REX v. HIGGINS.

(King's Bench, 1801. 2 East, 5.)

The defendant was indicted for a misdemeanor at the quarter sessions for the county of Lancaster, and was convicted on the second count of the indictment, charging, "That he on," etc., "at" etc., "did falsely, wickedly, and unlawfully solicit and incite one James Dixon, a servant of J. Phillips," etc., "to take, embezzle, and steal a quantity of twist, of the value of three shillings, of the goods and chattels of his master, J. P.," etc., "aforesaid, to the great damage of the said J. P.," etc., "to the evil example," etc., "and against the peace," etc. After judgment of the pillory and two years' imprisonment, a writ of error was brought, and the following causes assigned for error: (1) That the said count does not set forth any misdemeanor or offense which the justices of peace at their quarter sessions had jurisdiction to determine.¹

The case was twice argued—first in Trinity term last by Scarlett for the defendant and Cross for the crown, and now Topping for the defendant and Christian for the crown.

LE BLANC, J. It is contended that the offense charged in the second count, of which the defendant has been convicted, is no misdemeanor, because it amounts only to a bare wish or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done, namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by the several cases referred to. The cases of *R. v. Daniel* and *R. v. Callingwood*, cited for the defendant, do not support the proposition that a mere solicitation is not indictable. On the contrary, Lord Holt says in the former case (6 Mod. 101) that perhaps an indictment might be for the evil act of persuading another to steal. That part of the case, however, was determined upon the want of a venue. And in *R. v. Callingwood*, 2 Ld. Raym. 1116, the only point determined was that the first part of the charge, which was for enticing an apprentice to take and carry away goods from his master, was not indictable, being only a private injury for which an action on the case would lie, but not of such a public nature as to maintain an indictment, and that the second part of the charge was not well laid for want of a venue.

Judgment affirmed.²

¹ Part of this case is omitted.

² Kenyon, C. J., and Grose and Lawrence, JJ., delivered concurring opinions.

COMMONWEALTH v. HUTCHINSON.

(Superior Court of Pennsylvania, 1898. 6 Pa. Super. Ct. 405.)

SMITH, J. The defendant was convicted and sentenced on the charge of soliciting one Robert Williams to burn a store building.¹

It is contended, on the part of the defense, that solicitation to commit a misdemeanor is not indictable, and that, as the indictment charges only such solicitation, it sets forth no criminal offense.

There seems no question that solicitation to commit a felony is a misdemeanor. *Rex v. Higgins*, 2 East, 5; *Rex v. Hickman*, 1 Moody, 34; *Reg. v. Quail*, 4 F. & F. 1076; *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105; *People v. Bush*, 4 Hill (N. Y.) 133; *Commonwealth v. McGill et al.*, Add. (Pa.) 21; *State v. Bowers*, 35 S. C. 262, 14 S. E. 488, 15 L. R. A. 199, 28 Am. St. Rep. 847. This, however, cannot be affirmed of the broad proposition that solicitation to commit a misdemeanor is itself a misdemeanor. On the contrary, it seems clear that with respect to various misdemeanors, involving little or no moral turpitude or prejudice to society, solicitation to their commission is not in law an offense. It is equally clear that as to certain others it is an offense. The cases cited in Wharton's Criminal Law, § 179, show that such solicitations are indictable "when their object is interference with public justice, as when a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought, or is invited by the officer himself." In *Rex v. Phillips*, 6 East, 464, it was held that solicitation to commit a misdemeanor of an evil and vicious nature was indictable. The authorities collected in the notes to *Washington v. Butler*, 8 Wash. 194, 35 Pac. 1093, 25 L. R. A. 434, 40 Am. St. Rep. 900, embrace cases in which it was held indictable to solicit another to make a plate for counterfeiting bills of exchange, to commit assault and battery, or to commit perjury. There is also a class of cases frequently referred to in the discussion of this question, but really without bearing on it: Solicitations accompanied with the offer of a bribe, of which *Rex v. Plympton*, 2 Ld. Raymond, 1377, and *Rex v. Vaughan*, 4 Burr. 2494, are leading instances. In these the act sought was lawful. The offer of a bribe to influence its performance was the unlawful feature.

The adjudications by the highest court of our own state, on the subject of solicitation to commit crime, touch it only at two points. They decide that it is a misdemeanor to solicit the commission of murder, *Stabler v. Commonwealth*, 95 Pa. 318, 40 Am. Rep. 653; *Commonwealth v. Randolph*, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782; and that solicitation to commit fornication or adultery is not indictable, *Smith v. Commonwealth*, 54 Pa. 209, 93 Am. Dec. 686.

¹ The indictment and part of the opinion relating to a question of evidence are omitted.

The latter case does not, however, go to the length of declaring that solicitation to commit a misdemeanor is not a misdemeanor. No general rule on the subject was there laid down. The decision was based on the difficulty of defining the particular offense charged in the case, of determining "what expressions of the face or double entendres of the tongue, what freedom of manners, are to be adjudged solicitation," and on the principle that "a rule of law which should make mere solicitation to fornication or adultery indictable would be an impracticable rule, one that in the present usages and manners of society would lead to great abuses and oppressions." It may be added that the act charged was one that tended only to secret immorality by the parties immediately involved, and not directly to the public prejudice.

In the broad field lying between the extremes thus adjudicated, our guide must be found in the principles that underlie our Criminal Code. To reach just conclusions, we must pursue the method thus laid down by Mr. Justice Paxson in *Commonwealth v. McHale*, 97 Pa. 397, 39 Am. Rep. 808, and applied in that case: "We must look beyond the cases and examine the principles upon which common-law offenses rest. It is not so much a question whether such offenses have been punished as whether they might have been. * * * We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is, not whether precedents can be found in the books, but whether they injuriously affect the public police and economy."

The distinction, sometimes attempted, between solicitation to commit a felony and to commit a misdemeanor, is based on an artificial, and not an intrinsic difference. It has received comparatively slight judicial recognition. In *Reg. v. Ransford*, 13 Cox, C. C. 9, it was declared to be without foundation. Indeed, the statutory classification of crime as felony or misdemeanor is governed by no fixed or definite principle, but is purely arbitrary. Legislative whim or caprice may alone determine in which category an offense, not a felony at common law, shall be placed. There is no reason, arising from the nature of the offenses, why the burning of another's house shall be classed as a felony, and the burning of one's own house or other building with intent to defraud insurers, as a misdemeanor; why the larceny of money shall be pronounced a felony, and its embezzlement only a misdemeanor; why it shall be deemed a felony to make counterfeit coin, and but a misdemeanor to utter it, or a felony to attempt to utter a counterfeit bank note, and only a misdemeanor to utter counterfeit coin; why the possession of ten counterfeit bank notes, with intent to utter them, shall be declared a felony, and the forgery of a deed merely a misdemeanor; or why the forgery of a bank check shall be made a felony, and the forgery of a promissory note but a misdemeanor. With respect to the public police and economy, and the general interests of society, there are misdemeanors more pernicious in effect than

some of the felonies. As to the mode and incidents of trial there is no distinction, except as between offenses triable exclusively in the oyer and terminer and those within the jurisdiction of the quarter sessions. As to punishment, trial for misdemeanor may subject the defendant to punitive consequences more serious than those to which he is exposed in trial for many of the felonies, since the penalty is often more severe, and, even if acquitted, the costs may be imposed upon him. It is obvious that, with respect to the majority of criminal offenses, the distinction between felonies and misdemeanors rests on no substantial basis, and that the classification of an offense as a felony or a misdemeanor affords no just criterion for determining whether solicitation to its commission is indictable. Under such a test, one may be punished for soliciting the theft of the most trifling chattel, or the burning of the most worthless dwelling, yet may with impunity incite to the embezzlement of millions, or to the laying in ashes of the largest manufactories, or the entire business quarter of a city. The only practical and reasonable test is that stated and applied in *Commonwealth v. McHale*, *supra*—the manner in which the act may “affect the public police and economy”; and the only logical conclusion is that all acts which “especially affect public society,” to its injury, are criminal. The act for which the defendant is here indicted, as thus affecting public society, is the solicitation described in the indictment.

Argument is scarcely needed to demonstrate that the solicitation charged in the present case is of a character to injuriously affect public society and the public police and economy. Except solicitations to murder and riot, nothing is more calculated to disorder and terrorize society than incitements to incendiarism. Such incitement is a direct blow at security of property, and even of life. It must therefore be pronounced an indictable offense.

The judgment of the court below is affirmed.²

II. ATTEMPT.

PEOPLE v. MURRAY.

(Supreme Court of California, 1859. 14 Cal. 159.)

FIELD, C. J., delivered the opinion of the court—*COPE, J.*, and *BALDWIN, J.*, concurring.³

The evidence in this case entirely fails to sustain the charge against the defendant of an attempt to contract an incestuous marriage with his niece. It only discloses declarations of his determination to contract the marriage, his elopement with the niece for that avowed pur-

² Compare *Commonwealth v. Willard*, 22 Pick. (Mass.) 476 (1839).

³ The opinion only is printed.

pose, and his request to one of the witnesses to go for a magistrate to perform the ceremony. It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made. To illustrate: A party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim there is only preparation, and not an attempt. For the preparation, he may be held to keep the peace; but he is not chargeable with any attempt to kill. So, in the present case, the declarations, and elopement, and request for a magistrate were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said in strictness, that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party.

Judgment reversed, and cause remanded.

STATE v. HURLEY.

(Supreme Court of Vermont, 1906. 79 Vt. 28, 64 Atl. 78, 6 L. R. A. [N. S.] 804, 118 Am. St. Rep. 934.)

MUNSON, J., delivered the opinion of the court.

The respondent is informed against for attempting to break open the jail in which he was confined, by procuring to be delivered into his hands 12 steel hack saws, with an intent to break open the jail therewith. The state's evidence tended to show that, in pursuance of an arrangement between the respondent and one Tracy, a former inmate, Tracy attempted to get a bundle of hack saws to the respondent by throwing it to him as he sat behind the bars at an open window, and that the respondent reached through the bars and got the bundle into his hands, but was ordered at that moment by the jailer to drop it, and did so. The court charged, in substance, that if the respondent arranged for procuring the saws, and got them into his possession with an intent to break open the jail for the purpose of escaping, he was guilty of the offense alleged. The respondent demurred to the information, and excepted to the charge. Bishop defines a criminal attempt to be "an intent to do a particular criminal thing, with an act toward it falling short of the thing intended." 2 Crim. Law, § 728. The main difficulty in applying this definition

lies in determining the relation which the act done must sustain to the completed offense. That relation is more fully indicated in the following definition given by Stephen: "An attempt to commit a crime is an act done with intent to commit that crime, and forming a part of a series of acts which would constitute its actual commission if it were not interrupted." Dig. Crim. Law, 33. All acts done in preparation are, in a sense, acts done towards the accomplishment of the thing contemplated. But most authorities certainly hold, and many of them state specifically, that the act must be something more than mere preparation. Acts of preparation, however, may have such proximity to the place where the intended crime is to be committed, and such connection with a purpose of present accomplishment, that they will amount to an attempt. See note to *People v. Moran* (N. Y.) 20 Am. St. Rep. 741; *People v. Stites*, 75 Cal. 570, 17 Pac. 693; *People v. Lawton*, 56 Barb. (N. Y.) 126.

Various rules have been formulated in elucidating this subject. Some acts toward the commission of the crime are too remote for the law to notice. The act need not be the one next preceding that needed to complete the crime. Preparations made at a distance from the place where the offense is to be committed are ordinarily too remote to satisfy the requirement. 1 Bishop, Crim. Law, §§ 759, 762 (4), 763. The preparation must be such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended. 3 Am. & Eng. Enc. Law (2d Ed.) p. 266, note 7. The act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent. It must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. *Hicks v. Commonwealth*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891. But after all that has been said the application is difficult. One of the best known cases where acts of preparation were held insufficient is *People v. Murray*, 14 Cal. 159, which was an indictment for an attempt to contract an incestuous marriage. There the defendant had eloped with his niece with the avowed purpose of marrying her, and had taken measures to procure the attendance of a magistrate to perform the ceremony. In disposing of the case, Judge Field said: "Between preparations for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made." Mr. Bishop thinks this case is near the dividing line, and doubts if it will be followed by all courts. 1 Crim. Law, § 763 (3). Mr. Wharton considers the holding an undue extension of the doctrine that preliminary preparations are insufficient. Crim. Law, 181, note. But the case has been cited with approval by courts of high standing. The exact inquiry presented by the case before us is whether the procurement of the means of committing the offense is to be

treated as a preparation for the attempt, or as the attempt itself. In considering this question, it must be remembered that there are some acts, preparatory in their character, which the law treats as substantive offenses; for instance, the procuring of tools for the purpose of counterfeiting, and of indecent prints with intent to publish them. Comments upon cases of this character may lead to confusion, if not correctly apprehended. Wharton, Crim. Law, § 180, and note 1.

The case of *Griffin v. State*, 26 Ga. 493, cited by the respondent, cannot be accepted as an authority in his favor. There the defendant was charged with attempting to break into a storehouse with intent to steal, by procuring an impression of the key to the lock and preparing from this impression a false key to fit the lock. The section of the Penal Code upon which the indictment was based provides for the indictment of any one who "shall attempt to commit an offense prohibited by law, and in such an attempt shall do any act toward the commission of such offense." The court considered that the General Assembly used the word "attempt" as synonymous with "intend," and that the object of the enactment was to punish "intents," if demonstrated by an act. The court cited *Rex v. Sutton*, 2 Strange, 1074, as a strong authority in support of the indictment. There the prisoner was convicted for having in his possession iron stamps, with intent to impress the scepter on sixpences. This was not an indictment for any attempt, but for the offense of possessing tools for counterfeiting with intent to use them. The Georgia court, by its construction of the statute, relieved itself from the distinction between "attempts" and crimes of procuring or possessing with unlawful intent.

The act in question here is the procuring by a prisoner of tools adapted to jail-breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design.

Exceptions sustained, judgment and verdict set aside, demurrer sustained, information held insufficient and quashed, and respondent discharged.

CLARK v. STATE.

(Supreme Court of Tennessee, 1888. 86 Tenn. 511, 8 S. W. 145.)

FOLKES, J. This is an indictment for attempt to commit a larceny. There was a conviction and sentence of one year in the penitentiary. Motion for new trial and in arrest of judgment being made and overruled, the defendant has appealed in error.¹

The next error assigned is to the charge of the court in this: "If his purpose was to steal when he opened the drawer, and his opening it was a part of the act designed by him for getting possession of the prosecutor's money, he would be guilty of an attempt to commit larceny, even though at that particular time there was no money in the cash drawer."

The proof shows that the defendant was detected by the prosecutor in the act of opening the cash drawer of the latter's store, having thrown himself across the counter for that purpose, he being alone in the front part of the store at the time; the prosecutor being in the rear waiting on a customer, and being hidden from defendant's view by a screen. When thus detected, and hallooed at by the prosecutor, the defendant hurriedly left the store.

The proof leaves it in doubt whether or not there was any money in this particular drawer at the time the attempt was made. It was early in the morning, and the drawer had been emptied the evening before.

The court had stated to the jury that the state claimed that there was money in the drawer at the time of the alleged attempt, and that this was denied by the defendant, and that this was one of the questions of fact that they must determine, and that they must determine from the proof what was the purpose and intention of the prisoner in opening the cash drawer; and if they found that the defendant believed there was money or other valuables in said drawer, and his purpose in opening the same was to steal its contents, then he would be guilty of an attempt to commit larceny, whether there was money or other valuables in the drawer at the time or not.

There is no error in this record. The act averred and proven is sufficient.

The direct question here presented has never been passed upon by this court, but it is by no means one without authority. It has received much discussion in the text-books and in the adjudged cases from other courts.

The English cases are conflicting. In *Reg. v. Collins, Leigh & C.* 471, it was held there could be no attempt to pick the pocket of a person who had no money at the time in her pocket; while in *Reg. v. Goodhall*, 1 Den. C. C. 187, it was held an attempt to produce a

¹ Part of the opinion is omitted.

miscarriage could be committed on a woman supposed to be, but not in fact, pregnant.

It appears to us that these cases cannot be reconciled, although Mr. Heard, in his second edition of *Leading Criminal Cases* (volume 2, pp. 482, 483), has attempted to do so. We are constrained to agree with Mr. Bishop that "these differing opinions must have sprung from opposite views in the two benches of judges." See Bishop's *Cr. Law* (7th Ed.) § 741, note 1.

The American cases seem to be uniform, or at least substantially so, for here the few conflicts are more apparent than real.

In *Rogers v. Commonwealth*, 5 Serg. & R. 463, the Pennsylvania court held that an indictment for assault with intent to steal from the pocket is good, though it contains no setting out of anything in the pocket to be stolen. Duncan, J., in delivering the opinion of the court, said: "The intention of the person was to pick the pocket of whatever he found in it; and, although there might be nothing in the pocket, the intention to steal is the same."

So in Massachusetts, under a statute differing in terms but the same in substance as our own hereinabove quoted, it was held that the indictment need not allege, and the prosecutor need not prove, that there was in the pocket anything which could be the subject of larceny. *Commonwealth v. McDonald*, 5 Cush. 365. See, also, *Commonwealth v. Jacobs*, 9 Allen, 274.

To the same effect is *State v. Wilson*, 30 Conn. 500.

So in Indiana it has been held that an assault on one with intent to rob him of his money may be committed, though he has no money in possession at the time. *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22.

If an indictment for an intent to steal the contents of a trunk or room would not be good, where it transpired that there was nothing in the trunk or room, then it would seem to follow that the indictment, in case where there were goods in the trunk or room, would have to allege what particular goods the thief purposed to steal; and, if necessary to allege, it is necessary to prove, and how could this be proven where there was a variety of different goods, and the thief was arrested before he had laid hands upon any article?

Again, if a thief is caught with his hand in your pocket before he can grasp any of its contents, and it is found that the pocket contains both money and a watch, how can it be proven that he intended to steal both, and, if not both, which?

And in the case last put, is there any more of an attempt to steal, the thief being ignorant of the presence of the watch or money, than there would had he, with similar intent and ignorance, placed his hand in an empty pocket?

In each case there is the substantive and distinct offense as prescribed by the statute. There is the criminal intent, and an effort made to carry out the intent to the point of completion, interrupted

by some unforeseen impediment or lack outside of himself, special to the particular case and not open to observation, intervening to prevent success without the abandonment of effort or change of purpose on the part of the accused.

As said by Mr. Bishop: "It being accepted truth that the defendant deserves punishment by reason of his criminal intent, no one can seriously doubt that the protection of the public requires the punishment to be administered, equally whether, in the unseen depth of the pocket, etc., what was supposed to exist was really present or not." 1 Bishop, Cr. Law, § 741.

The community suffers from the mere alarm of crime.

Again: "Where the thing intended (attempted) is a crime, and what is done is of a sort to create alarm—in other words, excite apprehension that the evil intended will be carried out—the incipient act which the law of attempt takes cognizance of is in reason committed." 1 Bishop, Cr. Law, § 742.

The true legal reason for the conclusion reached is that the defendant, with criminal intent, has performed an act tending to disturb the public repose. *Id.* § 744.

Mr. Wharton's views on this at one time perplexing question are in accord with Mr. Bishop. See 1 Whart. Cr. Law (9th Ed.) §§ 182, 183, 185, 186, and 192.

Let the judgment be affirmed.²

PEOPLE v. JAFFE.

(Court of Appeals of New York, 1906. 185 N. Y. 497, 78 N. E. 169, 9 L. R. A. [N. S.] 263).

WILLARD BARTLETT, J.³ The indictment charged that the defendant on the 6th day of October, 1902, in the county of New York, feloniously received 20 yards of cloth, of the value of 25 cents a yard, belonging to the copartnership of J. W. Goldard & Son, knowing that the said property had been feloniously stolen, taken and carried away

² See, also, *State v. Glover*, 27 S. C. 602, 4 S. E. 564 (1888); *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732 (1890).

"If an assault should be made on a man dressed as a woman, with intent to ravish, the assailant believing the person assaulted to be a woman, he could not be convicted of an attempt to ravish, because in such a case the commission of the crime of rape would be a legal impossibility." Follett, J., in *People v. Gardner*, 73 Hun, 66, 25 N. Y. Supp. 1072 (1893).

"If I, believing that there is a person in an adjoining room, when in fact there is no one there, fire a pistol through the doorway with the intention of killing him, I have committed no act cognizable by the criminal law." Pollock, C. B., *arguendo*, in *Reg. v. Gaylor*, Dears. & B. 292 (1857). Cf. *People v. Lee Kong*, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165 (1892).

³ The opinion only is printed.

from the owners. It was found under section 550 of the Penal Code, which provides that a person who buys or receives any stolen property knowing the same to have been stolen is guilty of criminally receiving such property. The defendant was convicted of an attempt to commit the crime charged in the indictment. The proof clearly showed, and the district attorney conceded upon the trial, that the goods which the defendant attempted to purchase on October 6, 1902, had lost their character as stolen goods at the time when they were offered to the defendant and when he sought to buy them. In fact, the property had been restored to the owners, and was wholly within their control, and was offered to the defendant by their authority and through their agency. The question presented by this appeal, therefore, is whether, upon an indictment for receiving goods knowing them to have been stolen, the defendant may be convicted of an attempt to commit the crime where it appears without dispute that the property which he sought to receive was not in fact stolen property.

The conviction was sustained by the Appellate Division chiefly upon the authority of the numerous cases in which it has been held that one may be convicted of an attempt to commit a crime notwithstanding the existence of facts unknown to him which would have rendered the complete perpetration of the crime itself impossible. Notably among these are what may be called the "Pickpocket Cases," where, in prosecutions for attempts to commit larceny from the person by pocket-picking, it is held not to be necessary to allege or prove that there was anything in the pocket which could be the subject of larceny. *Commonwealth v. McDonald*, 5 Cush. (Mass.) 365; *Rogers v. Commonwealth*, 5 Serg. & R. (Pa.) 463; *State v. Wilson*, 30 Conn. 500; *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732. Much reliance was also placed in the opinion of the learned Appellate Division upon the case of *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741, where a conviction of an attempt to commit the crime of extortion was upheld, although the woman from whom the defendant sought to obtain money by a threat to accuse her of a crime was not induced to pay the money by fear, but was acting at the time as a decoy for the police, and hence could not have been subjected to the influence of fear. In passing upon the question here presented for our determination, it is important to bear in mind precisely what it was that the defendant attempted to do. He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact. The purchase, therefore, if it had been completely effected, could not constitute the crime of receiving stolen property knowing it to be stolen, since there could be no such thing as knowledge on the part of the defendant of a nonexistent fact, although there might be a belief on his part that the fact existed. As Mr. Bishop well says, it

is a mere truism that there can be no receiving of stolen goods which have not been stolen. 2 Bishop, New Crim. Law, § 1140. It is equally difficult to perceive how there can be an attempt to receive stolen goods, knowing them to have been stolen, when they have not been stolen in fact.

The crucial distinction between the case before us and the pick-pocket cases, and others involving the same principle, lies, not in the possibility or impossibility of the commission of the crime, but in the fact that in the present case the act which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated. If he had actually paid for the goods which he desired to buy and received them into his possession, he would have committed no offense under section 550 of the Penal Code, because the very definition in that section of the offense of criminally receiving property makes it an essential element of the crime that the accused shall have known the property to have been stolen or wrongfully appropriated in such a manner as to constitute larceny. This knowledge being a material ingredient of the offense, it is manifest that it cannot exist unless the property has in fact been stolen or larcenously appropriated. No man can know that to be so which is not so in truth and in fact. He may believe it to be so, but belief is not enough under the statute. In the present case it appeared, not only by the proof, but by the express concession of the prosecuting officer, that the goods which the defendant intended to purchase had lost their character as stolen goods at the time of the proposed transaction. Hence, no matter what was the motive of the defendant, and no matter what he supposed, he could do no act which was intrinsically adapted to the then present successful perpetration of the crime denounced by this section of the Penal Code, because neither he nor any one in the world could know that the property was stolen property, inasmuch as it was not, in fact, stolen property. In the pick-pocket cases the immediate act which the defendant had in contemplation was an act which, if it could have been carried out, would have been criminal; whereas in the present case the immediate act which the defendant had in contemplation (to wit, the purchase of the goods which were brought to his place for sale) could not have been criminal under the statute, even if the purchase had been completed, because the goods had not in fact been stolen, but were, at the time when they were offered to him, in the custody and under the control of the true owners.

If all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended. 1 Bishop's Crim. Law (7th Ed.) § 747. The crime of which the defendant was convicted necessarily consists of three elements: First, the act; second, the intent; and, third, the knowledge of an existing condition. There was proof tending to establish two of these elements, the first and second, but

none to establish the existence of the third. This was knowledge of the stolen character of the property sought to be acquired. There could be no such knowledge. The defendant could not know that the property possessed the character of stolen property when it had not in fact been acquired by theft. The language used by Ruger, C. J., in *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, quoted with approval by Earl, J., in *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741, to the effect that "the question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design," although accurate in those cases, has no application to a case like this, where, if the accused had completed the act which he attempted to do, he would not be guilty of a criminal offense. A particular belief cannot make that a crime which is not so in the absence of such belief. Take, for example, the case of a young man who attempts to vote, and succeeds in casting his vote under the belief that he is but 20 years of age, when he is in fact over 21 and a qualified voter. His intent to commit a crime, and his belief that he was committing a crime, would not make him guilty of any offense under these circumstances, although the moral turpitude of the transaction on his part would be just as great as it would if he were in fact under age. So, also, in the case of a prosecution under the statute of this state which makes it rape in the second degree for a man to perpetrate an act of sexual intercourse with a female not his wife under the age of 18 years. There could be no conviction if it was established upon the trial that the female was in fact over the age of 18 years, although the defendant believed her to be younger and intended to commit the crime. No matter how reprehensible would be his act in morals, it would not be the act forbidden by this particular statute. "If what a man contemplates doing would not be in law a crime, he could not be said, in point of law, to intend to commit the crime. If he thinks his act will be a crime, this is a mere mistake of his understanding, where the law holds it not to be such; his real intent being to do a particular thing. If the thing is not a crime, he does not intend to commit one whatever he may erroneously suppose." 1 Bishop's Crim. Law (7th Ed.) § 742.

The judgment of the Appellate Division and of the Court of General Sessions must be reversed, and the defendant discharged upon this indictment, as it is manifest that no conviction can be had thereunder. This discharge, however, in no wise affects the right to prosecute the defendant for other offenses of a like character concerning which there is some proof in the record, but which were not charged in the present indictment.

CHASE, J. (dissenting). I dissent. Defendant having, with knowledge, repeatedly received goods stolen from a dry goods firm by one of its employés, suggested to the employé that a certain specified

kind of cloth be taken. He was told by the employé that that particular kind of cloth was not kept on his floor, and he then said that he would take a roll of certain Italian cloth, and carried it away, but left it in another store, where he could subsequently get it for delivery to the defendant. Before it was actually delivered to the defendant the employers discovered that the employé had been stealing from them, and they accused him of the thefts. The employé then confessed his guilt, and told them of the piece of cloth that had been stolen for the defendant, but had not actually been delivered to him. The roll of cloth so stolen was then taken by another employé of the firm, and it was arranged at the police headquarters that the employé who had taken the cloth should deliver it to the defendant, which he did, and the defendant paid the employé about one-half the value thereof. The defendant was then arrested, and this indictment was thereafter found against him. That the defendant intended to commit a crime is undisputed. I think the record shows an attempt to commit the crime of criminally receiving property as defined in sections 550 and 34 of the Penal Code, within the decisions of this court in *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, and *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, and WERNER, JJ., concur with WILLARD BARTLETT, J. CHASE, J., dissents in memorandum.

Judgment of conviction reversed, etc.

SIMPSON v. STATE.

(Supreme Court of Alabama, 1877. 59 Ala. 1, 31 Am. Rep. 1)

BRICKELL, C. J. The indictment contains a single count, charging, in the prescribed form, the defendant with an assault with intent to murder one Michael Ford.¹ The offense charged must be proved, and an essential element of the present offense is not only an assault with intent to murder, but the specific intent to murder Ford, the person named in the indictment. If the intent was to murder another, or if there was not the specific intent to murder Ford, there cannot be a conviction of the aggravated offense charged, though there may be of the minor offense of assault, or of assault and battery. *Barkus v. State*, 49 Miss. 17, 19 Am. Rep. 1; *Jones v. State*, 11 Smedes & M. (Miss.) 315; *Ogletree v. State*, 28 Ala. 693; *Morgan v. State*, 33 Ala. 413; *State v. Abram*, 10 Ala. 928.

The intent cannot be implied as matter of law. It must be proved as matter of fact, and its existence the jury must determine from

¹ Part of the opinion is omitted.

all the facts and circumstances in evidence. It is true the aggravated offense with which the defendant is charged cannot exist, unless, if death had resulted, the completed offense would have been murder. From this it does not necessarily follow that every assault from which, if death ensued, the offense would be murder, is an assault with intent to murder, within the purview of the statute, or that the specific intent, the essential characteristic of the offense, exists. Therefore in *Moore v. State*, 18 Ala. 533, an affirmative instruction, "that the same facts and circumstances which would make the offense murder, if death ensued, furnish sufficient evidence of the intention," was declared erroneous. The court say: "There are a number of cases where a killing would amount to murder, and yet the party did not intend to kill. As if one from the housetop recklessly throw down a billet of wood upon the sidewalk where persons are constantly passing, and it fall upon a person passing by and kill him, this would be, by the common law, murder; but if, instead of killing him, it inflicts only a slight injury, that party could not be convicted of an assault with intent to murder." Other illustrations may be drawn from our statutes: Murder in the first degree may be committed in the attempt to perpetrate arson, rape, robbery, or burglary, and yet an assault committed in such attempt is not an assault with intent to murder. If the intent is to ravish, or to rob, it is under the statute a distinct offense from an assault with intent to murder, though punished with the same severity. And at common law, if death results in the prosecution of a felonious intent, from an act *malum in se*, the killing is murder. As if A. shoot at the poultry of B., intending to steal them, and by accident kills a human being, he is guilty of murder. 1 Russ. Cr. 540. Yet, if death did not ensue, if there was a mere battery, or a wounding, it is not, under the statute, an assault with intent to murder. The statute is directed against an act done with the particular intent specified. The intent in fact is the intent to murder the person named in the indictment, and the doctrine of an intent in law different from the intent in fact has no just application; and if the real intent shown by the evidence is not that charged there cannot be a conviction for the offense that intent aggravates, and in contemplation of the statute merits punishment as a felony. *Ogle-tree v. State*, *supra*; *Morgan v. State*, *supra*. As is said by Mr. Bishop, the reason is obvious. The charge against the defendant is that, in consequence of a particular intent reaching beyond the act done, he has incurred a guilt beyond what is deducible merely from the act wrongfully performed, and therefore to extract by legal fiction from this act such further intent, and then add it back to the act to increase its severity, is bad in law. 1 Bish. Cr. Law, § 514.

An application of these general principles will show that several of the instructions given by the city court were erroneous, and some of them misleading, or invasive of the province of the jury. The sixth asserts the familiar principle of the law of evidence that a man

must be presumed to intend the natural and probable consequences of his acts, and from it draws the conclusion "that, if a man shoots another with a deadly weapon, the law presumes that by such shooting he intended to take the life of the person shot." Whether this instruction would or would not be correct, if death had ensued from the shooting and the defendant was on trial for the homicide, it is not now important to consider. In a case of this character the instruction is essentially erroneous, for, if it has any force, it converts the material element of the offense, the intent to murder a particular person, into a presumption of law, drawn from the nature of the weapon and the act done with it; while the intent is a fact which must be found by the jury, and the character of the weapon and the act done are only facts from which it may or may not be inferred. The weapon used, and the act done, may in the light of other facts and circumstances import an intent to maim, or merely to wound, distinct offenses from that imputed to the defendant; and maiming or wounding is a probable natural consequence of the act done with such weapon.

The result is that the judgment of the city court is reversed, and the cause remanded. The prisoner will remain in custody until discharged by due course of law.²

III. CONSPIRACY.

STATE v. BUCHANAN.

(Court of Appeals of Maryland, 1821. 5 Har. & J. 317, 9 Am. Dec. 534.)

This was an indictment charging the defendants in the second count with a conspiracy falsely, fraudulently, and unlawfully, by wrongful and indirect means to cheat, defraud, and impoverish the president, directors, and company of the Bank of the United States. To this indictment there was a demurrer that the matter contained in the indictment was not sufficient to sustain the prosecution. The county court ruled the demurrer good (Dorsey, C. J., dissenting), and discharged the defendants. The present writ of error was brought on the part of the state.

² Accord: *Reg. v. Donovan*, 4 Cox, C. C. 401 (1850). See, also, *Commonwealth v. Brosk*, 8 Pa. Dist. R. 638 (1899).

"The accused being under 14 years of age, and conclusively presumed to be incapable of committing the crime of rape, it logically follows, as a plain, legal deduction, that he was also incapable in law of an attempt to commit it. He could not be held to be guilty of an attempt to commit an offense which he was physically impotent to perpetrate." *Riley, J.*, in *Foster v. Commonwealth*, 96 Va. 306, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. Rep. 846 (1898). Contra: *Commonwealth v. Green*, 2 Pick. (Mass.) 380 (1824).

There can be no conviction for an attempt to commit a crime which is itself only an attempt, as embezzlement. *State v. Sales*, 2 Nev. 268 (1866), or assault, *Wilson v. State*, 53 Ga. 205 (1874).

The case was argued in this court before CHASE, C. J., BUCHANAN, EARLE, and MARTIN, JJ.

CHASE, C. J.¹ I think it may be assumed, as a position which cannot be controverted and is free from doubt, that the common law of England, as it was understood at the time of the Declaration of Rights, was the law of Maryland; and I think the position is equally clear that it must be ascertained by the writings of learned men of the profession and by the judicial records and adjudged cases of the courts of England.

The questions now occur: Do the facts contained in the indictment constitute the crime or offense of conspiracy? And is conspiracy an offense at common law, indictable and punishable as such?

Sergeant Hawkins, in his Pleas of the Crown, c. 72, in defining conspiracy at common law, makes use of strong and explicit language, and says there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person. This definition is corroborated and supported by adjudged cases in the courts of England, and especially in the Court of King's Bench.

In 1 Lev. 125, 1 Burns' Justice, 355, *Rex v. Sterling and Others*, Brewers of London, information for unlawfully conspiring to impoverish the excisemen by making orders that no small beer, called gallon beer, should be made for a certain time, etc., the whole court concurred in the opinion, and gave judgment for the king.

St. 33 Edw. 1, *de conspiratoribus*, was made in affirmance of the common law, and is a final definition of the instances or cases of conspiracy mentioned in it; but certainly it does not comprehend all the cases of conspiracy at the common law, which is most apparent from the adjudged cases of the courts of England on that subject.

I consider the adjudications of the courts of England, prior to the era of the independence of America, as authority to show what the common law of England was, in the opinion of the judges of the tribunals of that country, and since that time, to be respected as the opinions of enlightened judges of the jurisprudence of England.

The better opinion appears to be that a conspiracy to do an unlawful act is an indictable offense, although the object of the conspiracy is not executed.² In this case the conspiracy to cheat, defraud, and impoverish the Bank of the United States, by appropriating the mon-

¹ The indictment is abridged, and the argument of counsel and the concurring opinion of Buchanan, J., are omitted.

² In some states by statute an overt act is necessary in specified cases to constitute the crime of conspiracy. See *People v. Daniels*, 105 Cal. 262, 38 Pac. 720 (1894); *State v. Clary*, 64 Me. 369 (1875); *Wood v. State*, 47 N. J. Law, 180 (1885); *People v. Flack*, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807 (1891); *U. S. v. Barrett* (C. C.) 65 Fed. 62 (1894).

eys, promissory notes, and funds of the bank to the use of the accused, has been proved by the admission and confession of the defendants, and a consummation of all the overt acts has been fully established.

The Poulterer's Case, 9 Coke, 56, 57: The *falsa alligantia* is a false binding, each to the other, by bond or promise to execute some unlawful act. Before the unlawful act executed, the law punishes the coadjunction, confederacy, or false alliance, to the end to prevent the unlawful act. "*Quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud. Et effectus punitur licet non sequatur effectus.*" And in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief and the innocent from suffering it. The defendants were punished by fine and imprisonment.

I think it is established by the decisions of the courts of England that a conspiracy to cheat is an offense indictable and punishable at common law. *Rex v. Wheatly*, 2 Burr. 1125. A cheat or imposition by one person only is not indictable at common law, but a conspiracy to cheat by two or more is indictable at common law, because ordinary care and caution is no guard against it. Indictment against Macarty and others, for a combination to cheat in imposing on the prosecutor stale beer mixed with vinegar for port wine. 6 Mod. 301. Indictment against Cope and others, for a conspiracy to ruin the trade of the prosecutor by bribing his apprentices to put grease into the paste, which had spoiled his cards. 1 Strange, 144. Indictment against Kinnersley and Moore, for a conspiracy to charge Lord Sunderland with endeavoring to commit sodomy with said Moore, in order to extort money from Lord Sunderland. The whole court gave judgment in support of the indictment, and punished Kinnersley by fine, imprisonment, etc., and sentenced Moore to stand in the pillory, suffer a year's imprisonment, and to give security for his good behavior. 1 Stra. 193, 196. Indictment against Rispal, 3 Burr. 1320: The indictment sets forth that Rispal and two others did wickedly and unlawfully conspire among themselves falsely to accuse John Chilton with having taken a quantity of human hair out of a bag, etc., for the purpose of exacting and extorting money from the said John Chilton. The court were of opinion that the indictment was well laid, and that the gist of the offense is the unlawful conspiring to injure Chilton by this false charge.

A combination among laborers or mechanics to raise their wages, is a conspiracy at common law, and indictable (8 Mod. 10), although lawful for each separately to raise his wages.

I consider the doctrine so firmly established by the decisions of the courts of England, prior to the era of our independence, that a combination or confederacy to do an unlawful act is a conspiracy indictable and punishable at common law, that I have deemed it unnecessary to refer to all the cases relative to this question, and there-

fore have contented myself with citing some of those which appear to me most apposite.

The opinion of Lord Ellenborough in *Rex v. Turner and Others*, 13 East, 230, does not impugn, but strongly sanctions and confirms, this doctrine. He says the cases of conspiracy have gone far enough. He should be sorry to push them still further. The charge in the indictment was for committing a civil trespass. He also says all the cases in conspiracy proceed on the ground that the object of the conspiracy is to be effected by some falsity.

I am of opinion that the judgment be reversed, and the demurres overruled.

Judgment reversed.

REX v. BYKERDIKE.

(Lancaster Assizes, 1832. 1 Moo. & R. 179.)

First count of the indictment charged that R. Bykerdike, with divers others, etc., did conspire, combine, confederate, and agree unlawfully to intimidate, prejudice, and oppress one John Garforth in his trade and occupation as agent for a certain colliery, to wit, etc., and to prevent the workmen of the said J. G. from continuing to work in the said colliery.

Second count laid a conspiracy to oppress and injure Joseph Jones and others, partners in a certain colliery, to wit, etc., and to prevent the workmen in the employ of the said J. J. and others, his partners, from continuing to work at the said colliery, and compel the said J. J. and others, his partners, to discharge the said workmen in their employ.

Jones was an owner of the Fairbottom Colliery. Garforth was agent for the colliery. Seven colliers had been summoned before a magistrate by Garforth for refusing to work. It appeared that this was done at their own request, as they were afraid to work, except under the appearance of being compelled to do so. The body of the other men met, having taken certain oaths, and agreed upon a letter addressed to Garforth, to the effect that all workmen in Garforth's employ would "strike in fourteen days unless the seven men were discharged from the colliery." The letter concluded: "By order of the board of directors for the body of coal miners. Fairbottom Colliery."¹

PATTESON, J., told the jury that a conspiracy to procure the discharge of any of the workmen would support the indictment, which did not necessarily lay the intent as to all the workmen, and, if it did, that it was still a question whether the facts would not have proved it as to all; further, that the statute never meant to empower work-

¹ Argument of counsel is omitted.

men to meet and combine for the purpose of dictating to the master whom he should employ, and that this compulsion was clearly illegal. The defendant was convicted.²

COMMONWEALTH v. SHERIFF.

(Court of Quarter Sessions of Philadelphia, 1881. 15 Phila. 393.)

Habeas corpus.

ALLISON, P. J. The defendants were charged, on oath of Michael T. Benerman, with having unlawfully conspired to injure the firm of Sherman & Co., by molesting, intimidating, and annoying said firm in their business, and were required to give bail in the sum of \$600 each, to answer said charge at the present October term of the quarter sessions.

The defendants, representing a trades union association, called upon a member of the firm at their office or place of business, and gave notice that the association had decided upon an increase of wages to be paid to journeymen printers employed in the offices of this city, and in case the increased rates were not paid by the said firm to the persons in their employ there would be a strike on the part of their employés. The demand for increase of compensation having been refused, the defendants proceeded to the office or shop of the complainants, where their journeymen were at work, and notified them that, the advanced rate of compensation having been refused, there would be a strike, or that a strike was ordered, and that after that day they should cease to work for Sherman & Co. until their wages had been advanced to the standard fixed by the union. All of the workmen, with one exception, including the foreman of the office, were members of the union, and according to the law of their organization were required to obey the rules and regulations of the body of which the defendants were the duly appointed representatives. Does this conduct on the part of defendants amount to an unlawful conspiracy, for which they may be indicted and placed on trial?

Prior to the act of June 14, 1872 (P. L. 1175), and the supplemental act of April 20, 1876 (P. L. 45), the law, as then settled, would have required this question to be answered in the affirmative. A conspiracy of workmen to raise wages by combining to coerce other persons to conform to rules adopted by such combination, regulating the price of labor, and carrying such rules into effect by acts and declarations tending to control the will and conduct of others, constituted a criminal, and therefore an indictable, offense. 3 Wharton, Cr. Law, § 2322; Bishop's Cr. Law, §§ 230, 231. This is equally true, whether the conspiracy was intended to coerce the free will

² Accord: *State v. Donaldson*, 32 N. J. Law, 151, 90 Am. Dec. 649 (1867).

and freedom of action of workmen or employer. In 3 Russell on Crimes, the law as there stated is: "A combination to obstruct others in carrying on their business and forcing them to submit to a book of prices, inducing workmen to leave their employer's service, the purpose being to obstruct the prosecutors in their manufacture and injure them in their business, and thus force their consent, would be a violation of law, which would be indictable." In *Commonwealth v. Carlisle*, Brightly's Rep. 40, Gibson, J., said: "A combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates. Where the purpose is injurious or unlawful, the gist of the offense is the conspiracy." *Morris Run Coal Co. v. Coal Co.*, 68 Pa. 186, 8 Am. Rep. 159, and numerous illustrations of the doctrine there cited by Agnew, C. J.

Admitting the law to have been clearly established, so that it would have subjected the defendants to indictment for the combination and acts done in pursuance of the conspiracy, as proved on the hearing in this case, what is their standing now before or under the law of Pennsylvania, as affected by the legislation of 1872 and 1876?

The act of 1872 (Purd. Dig. 351) declares that it shall be lawful for workmen, acting either as individuals or as members of any club, society, or association, to refuse to work for any person whenever, among other causes recited in the act, to continue such work would be contrary to the rules or regulations of such organization to which they may belong, and that such refusal shall not subject them to prosecution or indictment for conspiracy. This act sweeps away in a few words nearly all of the law which had been long established in England, and adopted in this country, touching organizations or combinations of workmen having for their object the regulation of amounts to be paid to them for their work by combination in clubs or societies. That which had been held to be contrary to law is declared to be lawful, and that which before would have subjected workmen to criminal prosecution, the act says, may be done without incurring the risk of indictment. It is, therefore, no longer unlawful to combine and organize and adopt regulations having for their object the increase of wages or the consideration to be paid for labor. The effect of such combination may be to prejudice the interests of the community, and may tend to injure individuals in their business by causing the employed to cease to work for an employer, and thus compel him to submit to a book or standard of prices, which had been fixed by workmen who had combined and organized for that purpose. The act contains, however, the material proviso that whoever shall hinder persons who desire to labor for their employers from so doing, or other persons from being employed as laborers, shall still be subject to prosecution and punishment as for a criminal conspiracy. What constituted such hindrance was not defined, and it was for the purpose of removing all ambiguity connected with the

word "hinder" in the act of 1872 that the supplemental law of April 20, 1876, was passed, which declares that the construction to be given to the proviso contained in the act of 1872 shall be that the use of lawful and peaceful means, having for their object a lawful purpose, shall not be regarded as "in any way hindering" persons who desire to labor, and that the use of force, threat, or menace of harm to persons or property shall alone be regarded as in any way hindering persons who desire to labor for their employers from so doing, or other persons from being employed as laborers.

Under this statement of the law of Pennsylvania, as it stands today in full force, the only question for our consideration is, do the acts of the defendants, representing and acting in behalf of a labor society, club, or organization, subject them to indictment? Does calling together upon the firm of Sherman & Co., demanding an increase of wages for the journeymen printers employed by the firm, with notice that a refusal would result in a strike of the workmen, followed by the defendants going together to the workshop of the prosecutors and notifying the journeymen that a strike was ordered, constitute the use of force, threat, or menace of harm to the persons or property of the firm, or to the members of the firm of Sherman & Co., or to their employés? Are these means otherwise than lawful and peaceful, and had they for their object a lawful purpose? We are unable to see wherein they offend against the law. If laborers may now lawfully combine, and, as members of such combination, refuse to work for an employer, when, in their opinion, the wages paid to them are insufficient, and if they may now lawfully refuse to work, when to do so would be contrary to the rules, regulations, or by-laws of any association to which they may belong, how can it be considered as amounting to force, threat, or menace of harm for two or more persons, authorized to act for such association, to say to an employer that a rule, by-law, or regulation of the association required the payment of increased wages, and that, on refusal to make such payment, their workmen were, by virtue of their membership of a lawful society and its regulations, required to stop work? It is true that striking, as it is called, or refusing to work, might, and probably would, result in harm to the business of Sherman & Co.; but that is the result of what the workmen may now lawfully do in their associated capacity, and does not constitute a threat or menace of harm in the sense in which these terms are to be understood as they are used in the act of 1876. The fact is not to be overlooked that it had too often been a matter of just complaint that workmen resorted to actual force, to threats and menace of injury to persons and property in the enforcement of a demand for an advanced rate of wages. Upon this the law always frowned. Such acts were always illegal. When done by agreement between two or more persons, they amounted to overt acts, growing out of a criminal conspiracy, which tended to the injury of the

community and to the subversion of individual rights of persons and property. This was the wrong referred to in the act of 1876, which it was declared would subject the offenders to punishment in the future, as it had in the past. Such acts were declared to be outside of the protection contemplated by the legislation which we are now considering, because such means are neither lawful nor peaceful, and because they are calculated to improperly hinder persons who desire to labor for their employers from so doing, and to prevent other persons from being employed as laborers.

It was further urged on behalf of the commonwealth that the intrusion of the defendants into the shop or workroom of the prosecutors was in itself a trespass, and therefore illegal, and that the means employed to carry into effect the purposes of the defendants are not sanctioned by the act of 1876. But this proposition is not borne out by the testimony in the cause; for it has not been shown that visits like the one made by defendants—workmen of the same craft going to shops where other workmen are employed—are not, at least, with the implied permission of the employers. It is not pretended in this case that defendants were forbidden to enter the shop, or that they were ordered to depart after they had entered, or that their conduct was not peaceable and orderly. The foreman having charge of the shop was present, and knew of the presence of the defendants and of the object of their visit. To this he did not object, and, in so far as he represented the prosecutors, may be said to have consented to, if he did not approve of, all that was said and done. Reaching the conclusion that the defendants are not shown to have done any act contrary to law, that no prima facie case of unlawful combination or criminal conspiracy has been shown by the testimony, they are hereby discharged.

COTE v. MURPHY.

(Supreme Court of Pennsylvania, 1894. 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686.)

Mr. Justice DEAN.¹ The defendants were members of the Planing Mill Association of Allegheny County and Builders' Exchange of Pittsburgh. The different partnerships and individuals composing these associations were in the business of contracting and building and furnishing building material of all kinds. On the 1st of May, 1891, there was a strike of the carpenters, masons, and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building.

The men demanded an eight-hour day, with no reduction in wages theretofore paid, which the employers refused to grant. Then a strike

¹ The opinion only is printed.

by the unions of the different trades was declared. The plaintiff, at the time, was doing business in the city of Pittsburgh as a dealer in building materials. He was not a member of either the "Planing Mill Association," or of the "Builders' Exchange." There were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen. They sought to secure building material from dealers wherever they could, and thus go on with their contracts. If they succeeded in purchasing the necessary material, the result would be that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay. The tendency of this was to strengthen the cause of the strikers, for those employed were able to contribute to the support of their fellow workmen who were idle. The two associations already named sought to enlist all concerned as contractors and builders or as dealers in supplies, whether members of the associations or not, in the furtherance of the one object, resistance to the demands of the workmen. The plaintiff, and six other individuals or firms engaged in the same business, refused to join them, and undertook to continue sales of building material to those builders who had conceded the eight-hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance, by inducing lumber dealers and others to refrain from shipping, or selling them in quantities, the lumber and other material necessary to carrying on the retail business. In several instances their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other, or both of the associations engaged in the contest with the striking workmen. The strike continued about two months. After it was at an end, the plaintiff brought suit against defendants, averring an unlawful and successful conspiracy to injure him in his business and to interfere with the course of trade generally, to the injury of the public; that the conspiracy was carried out by a refusal to sell to him building materials themselves, and by threats and intimidation preventing other dealers from doing so. Under the instructions of the court upon the evidence, there was a verdict for plaintiff in the sum of \$2,500 damages, which the court reduced to \$1,500; then judgment, and from that defendants take this appeal.

The plaintiff's case is not one which appeals very strongly to a sense of justice. The mechanics of Pittsburgh engaged in the different building trades, on 1st of May, 1891, demanded that eight hours should be computed as a day in payment of their wages. Their right to do this is clear. It is one of the indefeasible rights of a mechanic or laborer in this commonwealth to fix such value on his services as he sees proper, and, under the Constitution, there is no power lodged anywhere to compel him to work for less than he chooses to

accept. But in this case the workmen went further. They agreed that no one of them would work for less than the demand, and by all lawful means, such as reasoning and persuasion, they would prevent other workmen from working for less. Their right to do this is also clear. At common law this last was a conspiracy and indictable, but under the acts of 1869, 1872, 1876, and 1891 employés, acting together by agreement, may, with few exceptions, lawfully do all those things which the common law declared a conspiracy. They are still forbidden, in the prosecution of a strike, preventing any one of their number who may desire to labor from doing so, by force or menace of harm to person or property; but the strike here was conducted throughout in an orderly, lawful manner. The employers, contractors, and others engaged in building and furnishing supplies, members of the two associations already mentioned, to which these defendants belonged, refused to concede the demands of the workmen, and there then followed a prolonged and bitter contest. The members of the associations refused to furnish supplies to those engaged in the construction of any building where the contractor had conceded the eight-hour day. This, as individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further. They agreed among themselves that no member of the association would furnish supplies to those who were in favor of or had conceded the eight-hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers. To the extent of their power this agreement was carried out. This clearly was a combination, and the acts of assembly referred to do not, in terms, embrace employers. They only include within their express terms workmen. Hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators in their attempts to resist the demand for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance. That which by statute is permitted to the one side, the common law still denies to the other. If this position be well taken, we then have this inequality: The plaintiff, who is aiding a combination, either directly or indirectly, intentionally or unintentionally, to advance wages, sues for damages members of another combination who resist the advance. Nor is there any difference in the character of the acts or means on both sides in furtherance of their purposes. The workmen will not work themselves, and they use persuasion and reason with their fellows to keep them from going to work until the demand is conceded. The employers will not sell to contractors who concede the demand, and they do their best to persuade others engaged in the same business from doing so.

Then the element of real damage to plaintiff is absent. By far the larger number of dealers in the city and county were members of the combination which refused to sell. Only the plaintiff and six others

refused to enter the combination. The result was that these seven had almost a monopoly of furnishing supplies to all builders who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased. In a few instances he paid more to wholesale dealers and put in more time buying than he would have done if the associations had not interfered with those who sold him; but it is not denied that, as a result of the combination, he was individually a large gainer. True, he avers that, if defendants had gone no further than to refuse to sell themselves, he would have made a great deal more money—that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him; but that, by the fact of the combination and strike, he was richer at the end than when they commenced, is not questioned.

We have, then, these facts, somewhat peculiar in the administration of justice: A plaintiff suing and recovering damages for an alleged unlawful act, of which he himself, in so far as he aided the workmen's combination, is also guilty; and both acts springing from the same source, a contest between employers and employed as to the price of daily wages; and then the further fact, that this contest, instead of damaging him, resulted largely to his profit.

We assume, so far as concerns defendants, if their agreement was unlawful, or, if lawful, it was carried out by unlawful acts, to the damage of plaintiff, the judgment should stand. All the authorities of this state go to show that, while the act of an individual may not be unlawful, yet the same act, when committed by a combination of two or more, may be unlawful, and therefore be actionable. A dictum of Lord Denman, in *R. v. Seward*, 1 A. & E. 711, gives this definition of a conspiracy: "It is either a combination to procure an unlawful object, or to procure a lawful object by unlawful means." This leaves still undetermined the meaning to be given the words "lawful" and "unlawful," in their connection in the antithesis. An agreement may be unlawful in the sense that the law will not aid in its enforcement, or recognize it as binding upon those who have made it, yet not unlawful in the sense that it will punish those who are parties to it, either criminally or by a verdict in damages. Lord Denman is reported to have said afterwards in *R. v. Heck*, 9 A. & E. 690, that his definition was not very correct. See note to Wharton's Criminal Law, § 2291.

It is conceded, however, in the case in hand, any one of defendants, acting for himself, had a right to refuse to sell to those favoring the eight-hour day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. Gibson, J., in *Com. v. Carlisle*, Brightly's R. 39, says: "Where the act is lawful for the individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public

or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

In the same case it is held: "A combination is criminal, wherever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederacy, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to artificial means on either side is criminal." This case puts the law against the combination in as strong terms, if not stronger, than any others of our own state. The significant qualification of the general principle, as mentioned in the last three lines, will be noticed: "If there was no recurrence to artificial means on either side." The prejudice to the public is the use of artificial means to affect prices whereby the public suffers. A combination of stockbrokers to corner a stock, of farmers to raise the price of grain, of manufacturers to raise the price of their product, of employers to reduce the price of labor, of workmen to raise the price, were at the date of that decision, at common law, all conspiracies. The fixed theory of courts and legislators then was that the price of everything ought to be, and in the absence of combination necessarily would be, regulated by supply and demand. The first to deny the justice of this theory, and to break away from it, was labor, and this was soon followed by the legislation already noticed, relieving workmen from the penalties of what, for more than a century, had been declared unlawful combinations or conspiracies. Wages, it was argued, should be fixed by the fair proportion labor had contributed in production. The market price, determined by supply and demand, might or might not be fair wages, often was not, and as long as workmen were not free by combination to insist on their right to fair wages, oppression by capital, or, which is the same thing, by their employers, followed. It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however, is clear: The moment the Legislature relieved one and by far the larger number of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor and by a combination the price was raised, down went the foundation on which common-law conspiracy was based as to that particular subject. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combination interfered with the price which would otherwise be regulated by supply and demand. This interference was in restraint of trade or business, and prejudicial to the public at large. Such combination made an artificial price. Workmen, by reason of the combination, were not willing to work for what otherwise they would accept. Employers would not pay what otherwise they would consider fair wages. Supply and demand

consist in the amount of labor for sale and the needs of the employer who buys. If more men offer to sell labor than are needed, the price goes down, and the employer buys cheap. If fewer than required offer, the price goes up, and he buys dear. As every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common-law conspiracy in this class of cases. But in this case the workmen, without regard to the supply of labor or the demand for it, agree upon what in their judgment is a fair price, and then combine in a demand for payment of that price; when refused, in pursuance of the combination, they quit work, and agree not to work until the demand is conceded; further, they agree by lawful means to prevent all others, not members of the combination, from going to work until the employers agree to pay the price fixed by the combination; and this, as long as no force was used, or menaces to person or property, they had a lawful right to do, and so far as is known to us the price demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand. It was fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not to lower the wages theretofore paid, but to resist the demand of a combination for an advance; not to resist an advance which would naturally follow a limited supply in the market, for the supply, so far as the workmen belonging to the combination was concerned, was by combination wholly withdrawn, and as to workmen other than members, to the extent of their power, they kept them out of the market. By artificial means the market supply was almost wholly cut off. The combination of the employers, then, was not to interfere with the price of labor as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price as regulated by the supply. The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice toward plaintiff or others, is lacking, and this is the essential element on which are founded all decisions as to common-law conspiracy in this class of cases. And however unchanged may be the law as to combinations of employers to interfere with wages, where such combinations take the initiative, they certainly do not depress the market price when they combine to resist a combination to artificially advance price.

"The reason of the law is the life of the law," and, as given in the cases cited by appellee, irresistibly impels to the conclusion that the combination here was not unlawful; a conclusion which is clearly indicated in *Com. v. Carlisle*, *supra*, that it would not be unlawful, if there was first recurrence to artificial means by workmen to raise the market price. Here the first step provocative of a combination by the employers was an attempt by lawful, artificial means on part of the

workmen to control the supply of labor, preparatory to a demand for an advance.

Nor does the fact that the appellee was not a workman, or a member of any of the unions of workmen, put him in any better attitude than if he were. He undertook for his own profit to aid the cause of the workmen. His right to do so was unquestionable. But, if the employers by a lawful combination could limit his ability so to do, they did not make themselves answerable in damages to him for the consequences of a lawful act.

The case of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159, is not in point. It was the attempt to enforce the collection of a draft given by one member of a combination formed to raise the price of coal to another, in consideration of certain stipulations in the agreement. It was held that the combination, being in restraint of trade, was unlawful, and, as the draft was given in pursuance of the unlawful contract, it also was tainted with the illegality, and there could be no recovery.

But, if the agreement itself were not unlawful, were the methods to carry it out unlawful? If the employers' combination here had used illegal methods or means to prevent other dealers from selling supplies to plaintiff, the conspiracy might still have been found to exist. The threats referred to, although what are usually termed threats, were not so in a legal sense. To have said they would inflict bodily harm on other dealers or villify them in the newspapers, or bring on them social ostracism, or similar declarations, these the law would have deemed threats, for they may deter a man of ordinary courage from the prosecution of his business in a way which accords with his own notions; but to say, and even that is inferential from the correspondence, that if they continued to sell to plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice. It may have prompted him to a somewhat sordid calculation. He may have considered which custom was most profitable, and have acted accordingly; but this was not such coercion and threats as constituted the acts of the combination unlawful. *Rodgers v. Duff*, 13 Moore, P. C. 209; *Bowen v. Matheson*, 14 Allen (Mass.) 499; *Bohn Mfg. Co. v. Hollis et al.*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319.

On the main question the case last cited goes further than we are called upon to go, as yet, in this state. It holds that what is not unlawful when done by an individual cannot be unlawful when done by many, and therefore the combination not to deal with those who broke the rules of the association was not a conspiracy. For this a number of cases from other states, as well as from England, are cited. But the law in this state has heretofore been determined otherwise from a very early day by an unbroken line of decisions which here call for no qualification; for, so far as concerns the facts of this case, the Legislature has so changed the law as to render these decisions inapplicable. We

concede, however, that the decisions of other courts are by no means uniform. Mr. Wright, in his work on the Law of Criminal Conspiracies and Agreements (London, 1873), says: "It is conceived that, on a review of all the decisions, there is a great preponderance of authority in favor of the proposition that, as a rule, an agreement or combination is not criminal, unless it be for acts or omissions, whether as ends or means, which would be criminal apart from agreement."

Logically, the same rule would apply, as was held in *Bohn Mfg. Co. v. Hollis*, to combinations which, although not criminal, are alleged to be unlawful.

But without regard to whether the general rule be settled by the weight of authority, as claimed by the appellants, we hold here that this combination was not unlawful, because: (1) It was not made to lower the price of wages as regulated by the supply and demand, but to resist an artificial price made by a combination which by statute was not unlawful. (2) The methods adopted to further the objects of the combination were not unlawful.

Another point has been most earnestly pressed upon our consideration by counsel for appellants. It is argued that, under our Declaration of Rights, either the acts of assembly of 1869, 1872, 1876, and 1891, exempting employes from the penalties of unlawful combination to fix the price of labor are void, because, by their terms, they embrace only a particular class of citizens of the commonwealth, or their scope must be enlarged beyond the express terms of these acts, so as to include within their protection all those interested in the same subject of legislation. It is argued that it is not within the power of the Legislature to declare some citizens innocent of any offense against the law for the very same act which, when committed by some others in the same business, the law will still hold to be criminal; that what the statute declares is not conspiracy in one case cannot, under the law, be conspiracy in the other; and therefore, in every contest of this kind between workmen and employers, the statute, if not void, must at least be held to operate equally to the exemption of all citizens interested in the subject affected by the combination. If there be nothing criminal in a combination to artificially raise wages, there can be nothing criminal in an employers' combination to resist the advance or to artificially depress them.

This question is not in the case, in the view we have taken of the facts. We are at all times averse to passing on questions the answers to which are not necessary to a decision of the case immediately before us; much less are we inclined to discuss and decide questions involving the constitutional power of a co-ordinate branch of the government. For this reason we refrain from a consideration of the able argument of counsel for appellant on this point.

The refusal of the court below to affirm appellant's seventh prayer for instructions, that "under all the evidence the verdict must be for defendants," was error, and, being here assigned for error, the appeal is sustained, and judgment reversed.

STATE v. STEWART.

(Supreme Court of Vermont, 1887. 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.)

Indictment for a conspiracy to hinder and prevent the Ryegate Granite Works, a corporation doing business at Ryegate, from employing certain granite cutters, and for hindering and deterring certain laborers from working for the said corporation. Heard, June term, 1885, Ross, J., presiding, upon respondents' demurrer and motion to quash the indictment. The demurrer was overruled pro forma, and the motion to quash denied, to which the respondents excepted.¹

POWERS, J. Although authorities can be found that lay down the rule that felonies and misdemeanors, or different felonies, cannot be joined in the same indictment, still the rule in this and most of the states is otherwise.

It is always and everywhere permissible for the pleader to set forth the offense he seeks to prosecute in all the various ways necessary to meet the possible phases of evidence that may appear at the trial. If the counts cover the same transaction, though involving offenses of different grade, the court has it in its power to preserve all rights of defense intact. *Commonwealth v. McLaughlin*, 12 Cush. (Mass.) 612; *State v. Lincoln*, 49 N. H. 464; *State v. Smalley*, 50 Vt. 736; *State v. Thornton*, 56 Vt. 35; *Rex v. Ferguson*, 2 Stark, 489. Moreover, the motion to quash is addressed to the discretion of the court, and its refusal is not the subject of revision here. *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Commonwealth v. Ryan*, 9 Gray (Mass.) 137; 1 Wharton, Cr. Law, § 519.

The respondents' counsel argues that the first and second counts do not cover the offense of criminal conspiracy at common law. But we think, upon a careful examination of the English and American cases cited in argument, and we suspect that none have been overlooked on either side, that it is clear to a demonstration that a combination of the character set forth in these counts was a conspiracy at the common law, and, further, that the subject-matter of the offense being the same in this country as in England, namely, an interference with the property rights of third persons, and a restraint upon the lawful prosecution of their industries, as well as an unlawful control over the free use and employment by workmen of their own personal skill and labor, at such times, for such prices, and for such persons as they please, the common law of England is "applicable to our local situation and circumstances" in this behalf, and is therefore the common law of Vermont.

In England and here it is lawful, and, it may be added, commendable, for any body of men to associate themselves together for the purpose of bettering their condition in any respect, financial or social. The very genius of free institutions invites them to higher levels and

¹ The indictment and the arguments of counsel are omitted.

better fortunes. They may dictate their own wages, fraternize with their own associates, choose their own employers, and serve man and mammon according to the dictates of their own conscience.

But, while the law accords this liberty to one, it accords a like liberty to every other one; and all are bound to so use and enjoy their own liberties and privileges as not to interfere with those of their neighbors.

All the legislation in England and America has been progressively in the direction of according to laborers the enjoyment of equal rights with others.

The early English statutes, beginning with the middle of the fourteenth century, are to be read in the light of the civilization of that day, and their provisions, to us of the nineteenth century harsh, illiberal, and tyrannical, were but the reflex of the prevalent notions of class distinctions that shaped and guided the social and political polity of those days.

From time to time, however, down to 1875, this legislation has been liberalized and Christianized; and to-day in England, as here, workmen stand upon the same broad level of equality before the law with all other vocations, professions, or callings whatsoever, respecting the disposition of their labor and the advancement of their associated interests.

There, as here, it is unlawful for employers wrongfully to coerce, intimidate, or hinder the free choice of workmen in the disposal of their time and talents. There, as here, it is unlawful for workmen wrongfully to coerce, intimidate, or hinder employers in the selection of such workmen as they choose to employ. There, as here, no employer can say to a workman he must not work for another employer, nor can a workman say to an employer he cannot employ the service of another workman.

By the law of the land, these respondents have the most unqualified right to work for whom they please, and at such prices as they please. By the law of the land, O'Rourke and Goodfellow have the same right. By the same law, the Ryegate Granite Company has the right to employ the respondents or O'Rourke on such terms as may be mutually agreed upon, without let, hindrance, or dictation from any man or body of men whatever.

Suppose the members of a bar association in Caledonia county should combine and declare that the respondents should employ no attorney, not a member of such association, to assist them in their defense in this case, under the penalty of being dubbed a "scab," and having his name paraded in the public press as unworthy of recognition among his brethren, and himself brought into hatred, envy, and contempt; would the respondents look upon this as an innocent intermeddling with their rights under the law? The proposition has only to be stated to disclose its utter inconsistency with every principle of justice that permeates the law under which we live.

If such conspiracies are to be tolerated as innocent, then every farmer in Vermont, now resting in the confidence that he may employ such assistance in carrying on his farm as he thinks he can afford to hire, is exposed to the operation of some secret code of law, in the framing of which he had no voice, and upon the terms of which he has no veto, and every manufacturer is handicapped by a system that portends certain destruction to his industry. If our agricultural and manufacturing industries are sleeping upon the fires of a volcano, liable to eruption at any moment, it is high time our people knew it.

But happily such is not the law, and among English-speaking people never has been the law. The Reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal, whether they promote objects or adopt means that are per se indictable, or promote objects or adopt means that are per se oppressive, immoral, or wrongfully prejudicial to the rights of others.

If they seek to restrain trade, or tend to the destruction of the material prosperity of the country, they work injury to the whole public.

These propositions are the clear deduction of the cases cited in argument, and breathe a spirit of equality and justice that must commend itself to every intelligent mind.

Counsel have cited to us no case in which it has been ruled that this crime of conspiracy does not exist at the common law: We are referred to Mr. Wright's clever monograph upon Criminal Conspiracies, wherein the author, though not denying that conspiracies to injure industries and against the free exercise of one's calling according to his own choice were held to be criminal at the common law, still attempts to throw doubt upon the basis upon which the doctrine rests.

But when, in 1 Hawkins' Pleas of the Crown, c. 27, § 2 (a book of great authority), 2 Russell on Crimes, 674, it is laid down "that all conspiracies whatever, wrongfully to prejudice a third person, are highly criminal at common law," and in 2 Wharton's Criminal Law, § 2322, it is said that "a combination is a conspiracy in law, whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief," and the same proposition, in one form of expression and another, is laid down in 2 Bishop's Criminal Law, § 172, and in Desty's Criminal Law, § 11, and in 3 Chitty's Criminal Law, 1138, and in Archbold's Crim. Prac. & Pl. 1830, and it was said

by Denman, C. J., in *Queen v. Kenrick*, 5 Q. B. 49: "It was contended, in the first place, that the third count was bad by reason of uncertainty, as giving no notice of the offense charged. The whole law of conspiracy, as it has been administered at least for the last hundred years, has been thus called in question; for we have sufficient proof that during that period any combination to prejudice another unlawfully has been considered as constituting the offense so called. The offense has been held to consist in the conspiracy, and not in the acts committed for carrying it into effect; and the charge has been held to be sufficiently made in general terms describing an unlawful conspiracy to effect a bad purpose"—and Baron Rolfe, in *Reg. v. Selby*, 5 Cox, Crim. Cas. 495, and Tindal, C. J., in *Reg. v. Harris*, 1 Car. & M. 661, and Crompton, J., in *Hilton v. Eckersley*, 6 E. & B. 47, and Grove, J., in *Rex v. Mawbey*, 6 T. R. 619, and Lord Mansfield, in *Rex v. Eccles*, 1 Leach, Crown Cas. 274, and Hill, J., in *Walsby v. Anley*, 3 E. & E. 516, and Campbell, C. J., in *Reg. v. Rowlands*, 17 Adol. & El. 670, and Baron Bramwell, in *Reg. v. Druitt*, 10 Cox, Crim. Cas. 592, and Brett, J., in *Reg. v. Bunn*, 12 Cox, Crim. Cas. 316, and Malins, V. C., in *Springhead Co. v. Riley*, L. R. 6 Eq. 551, and Coleridge, C. J., in *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, and Shaw, C. J., in *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 128, 38 Am. Dec. 346, and Caton, C. J., in *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780, and Gibson, C. J., in *Commonwealth v. Carlisle*, Journal Jurisprudence, 225, and Chapman, C. J., in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, have all added their indorsement of the doctrine advanced as early as the work of Hawkins, *supra*: it is manifest that we are compelled to forsake the literature of doubt, and to cleave unto that of authority. See, also, *Rex v. Ferguson*, 2 Starkie, N. P. 489; *Rex v. Bykerdyke*, 1 M. & Rob. 179; *People v. Fisher*, 14 Wend. (N. Y.) 9; *State v. Donaldson*, 32 N. J. Law, 151, 90 Am. Dec. 649; *Snow v. Wheeler*, 113 Mass. 186; *State v. Noyes*, 25 Vt. 415; *State v. Burnham*, 15 N. H. 396; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159.

Vice Chancellor Malins, in the case cited, *supra*, states the law of the subject in brief but intelligible words: "Every man is at liberty to enter into a combination to keep up the price of wages; but, if he enters into a combination for the object of interfering with the perfect freedom of action of another man, it is an offense, not only at common law, but under St. 6 Geo. IV, c. 129."

The principle upon which the cases, English and American, proceed is that every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and, if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer,

the investments of commerce, are all in equal sense property. If men by overt acts of violence destroy either, they are guilty of crime. The anathemas of a secret organization of men, combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence; and, while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay a basis for an indictment on the ground that the state itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The good order, peace, and general prosperity of the state are directly involved in the question.

In the case at bar the third and fourth counts set forth more particularly the methods adopted by the respondents to interfere with the prosecution of its business by the Ryegate Granite Works. They charge the respondents with an intent to prevent the prosecution of the work of that company by threatening O'Rourke, Goodfellow, and others, that the Ryegate Granite Works were "scab shops," and all workmen therein were "scabs," and their names would be published in the "scab" list in the Granite Cutter's Journal, and that they would be shunned, and not allowed to work with any other granite cutters, and would be disgraced in the craft, etc., by all of which O'Rourke, Goodfellow, and others were frightened and driven away from said shops.

The exposure of a legitimate business to the control of an association that can order away its employes and frighten away others that it may seek to employ, and thus be compelled to cease the further prosecution of its work, is a condition of things utterly at war with every principle of justice and every safeguard of protection that citizens under our system of government are entitled to enjoy. The direct tendency of such intimidation is to establish over labor and over all industries, a control that is unknown to the law, and that is exerted by a secret association of conspirators, that is actuated solely by personal considerations, and whose plans, carried into execution, usually result in violence and the destruction of property.

That evils exist in the relations of capital and labor, and that workmen have grievances that oftentimes call for relief, are facts that observing men cannot deny. With such questions we, as a court, have no function to discharge further than to say that the remedy cannot be found in the boycott.

We do not deem it necessary to extend this discussion—already too long drawn out—in following seriatim the numerous objections taken in the able and elaborate brief of the respondents to the different counts of this indictment. The general scope of the views expressed covers the whole ground, we think; and the result is the judg-

ment of the county court, overruling the motion to quash, and overruling the demurrer, and adjudging the indictment to be sufficient, is affirmed; and the cause is remanded, to be further proceeded with.²

SECTION 3.—AUTHORIZED ACTS.

I. ACTS IN FURTHERANCE OF PUBLIC JUSTICE.

This kind of occision of a man according to the laws of the kingdom and in execution thereof ought not to be numbered in the rank of crimes, for it is the execution of justice, without which there were no living, and murders, burglaries, and all capital crimes would be as frequent and common as petit trespasses and batteries. The taking away of the life, therefore, of the malefactor according to law by sentence of the judge, and by the sheriff or other minister of justice pursuant to such sentence, is not only an act of necessity, but of duty, not only excusable, but commendable, when the law requires it.
* * * The deliberate, uncompelled, extrajudicial killing of a person attaint of treason, felony, or murder, or in a præmunire; tho' upon the score of their being such, is murder.

Therefore it is necessary (1) that he that gives sentence of death against a malefactor be authorized by lawful commission or charter, or by prescription to have cognizance of the cause; (2) that he that executes such sentence be authorized to make such execution, otherwise it will be murder or manslaughter, or at least a great misprision in the judge that sentenceth, or in the minister that executeth. 1 Hale, P. C. 496.

² Accord: *Boycotting*, State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23 (1887); *Crump v. Commonwealth*, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895 (1888).

If the indictment is for conspiracy to commit a crime of which concert is an essential element, such as adultery, the agreement to do the act cannot be separated from the act itself to form the foundation for a charge of conspiracy. *Shannon v. Commonwealth*, 14 Pa. 226 (1850); *Miles v. State*, 58 Ala. 390 (1877). Cf. *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700 (1901).

To convict of conspiracy, it is not necessary that defendant was a party to the conspiracy at its formation. He is guilty if, with knowledge of the conspiracy, he aids in carrying it into execution. *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122 (1830). Since the conspiracy is complete when the unlawful agreement is made, a subsequent withdrawal before the contemplated act is committed is no defense to the charge of conspiracy. *Dill v. State*, 35 Tex. Cr. R. 240, 33 S. W. 126, 60 Am. St. Rep. 37 (1895).

LEONIN'S CASE.

(Worcestershire Eyre, 1221. Select Pleas of the Crown. Sel. Soc. Pl. 133.)

Leonin, Phillip's son, and Jacob his servant slew John of Middleton in the forest of Kinfare and fled and were dwelling in Staffordshire in the township of Kinfare. And therefore this must be discussed at Stafford. Let them be exacted and outlawed. Inquiry as to their chattels must be made at Stafford. Englishry is presented.

Afterwards came John, Phillip's son, Robert of Stapleton and Adam of Peissi and undertook to produce Leonin and Jacob before the justices at Stafford to abide judgment. So the sheriff is ordered that the exacting and outlawing be respited until they shall have another order.

At Lichfield came Leonin and Jacob and put themselves upon their verdict as to when, where, and by whom the deed was done. The jurors of the hundred of Seisdon say that in the time of the war John came with many others into the king's forest to offend in the forest, as was his wont, and was found seised of the whole body of a doe, and the king's servants and foresters could not take him alive, and he defended himself against our lord the king and cut off a forester's finger, and thus it was that he was slain. And so it is considered that [Leonin and Jacob] be quit thereof.¹

UNITED STATES v. RICE.

(United States Circuit Court for North Carolina, 1875. 1 Hughes, 560, Fed. Cas. No. 16,153.)

On the 15th of last September, Andrew Woody, of Spring Creek, Madison county, was killed by Noah H. Rice, a United States deputy marshal, who was endeavoring to serve a capias on him for violation of the internal revenue laws. From facts developed before the court it appears that Woody had expressed a determination to resist any process which might issue against him, and had threatened to kill the defendant, Rice, if he attempted to arrest him. When this officer came upon Woody, the latter was armed with a rifle. His demeanor was hostile, and when commanded to surrender he so acted as to impress the officer with the belief that his intention was to shoot him, and in self-defense he fired upon Woody with fatal effect. Rice came to Asheville and surrendered himself to the authorities, was examined by Commissioner Watts on application for bail, and committed to jail. His case was finally removed to the United States court, on Tuesday, May 11, 1875. He was placed upon trial for his life. The jury hav-

¹ See, also, Anon. Y. B. 30 & 31 Edw. I, 512 (1302).

ing requested full instructions from the bench, they were given as follows by

DICK, J. As this is a case of considerable importance to the defendant, and also to the due administration of justice, I have deemed it proper to commit to writing my instructions to the jury upon the questions of law involved.¹

It is conceded that the alleged homicide was committed by the defendant, and he places his defense upon the ground that he was a regular constituted officer of the United States, and had in his hands at the time of the homicide the process of law which authorized and commanded him to arrest the deceased for a crime against the United States; that the deceased resisted the execution of such process with a deadly weapon in his hands, and had manifested a purpose to use such deadly weapon in resistance; and that the homicide was necessarily committed in the attempt to make an arrest.

This defense necessarily leads us to inquire what protection the common law affords to ministerial officers, and how far they are authorized to go in the performance of their public duties.

Social order and political government are dependent upon the observance of law by the citizen. The mandates of the law are executed by officers provided for such purposes, and such officers are invested by the law with the authority necessary to execute its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed. This rule is absolutely necessary for the advancement of justice, and is founded in wisdom and equity and in the principles of social and political order. The law must be supreme within the sphere of its operation, or its influence would be nugatory, and there would be no certain rule to regulate human conduct in society and government, and all the rights and liberties of citizens would soon be lost in a chaos of anarchy.

Mr. Justice Foster says: "Ministers of justice, while in the execution of their offices, are under the peculiar protection of the law." Foster, 308. If an officer is killed while performing his duty, the law deems such killing murder of malice prepense.

This protection is not confined to the precise time when the officer is performing his official duty, but extends over him while going to, remaining at, and returning from the place of action. Any opposition, obstruction, or resistance intended to prevent an officer from doing his official duty is an indictable offense at common law, and the punishment is regulated by the nature of the offense.

An officer is authorized to summons as many persons as may be necessary to assist him in the performance of his legal duties, and such persons are bound to obey such summons, and they are under the same protection afforded to officers, as they are for the time officers of the law. The law imposes upon private persons the duty of sup-

¹ Part of the charge is omitted.

pressing affrays, preventing felonies from being committed in their presence, and arresting such offenders and bringing them to justice; and such private persons, while performing their duties, are under the protection of the law. We may confidently lay down the broad general principle that, when any person is performing a public duty required of him by law, he is under the protection of the law. An officer of the law who has legal process in his hands is bound to execute it according to the mandate of the writ. If he is resisted in the performance of this duty, he must overcome such resistance by the use of such force as may be necessary for him to execute his duty. If necessary, the law authorizes him to resort to extreme measures, and if the resisting party is killed in the struggle the homicide is justifiable. *Garrett's Case*, *Winston*, 144.²

If unnecessary and excessive force is used, after resistance has entirely ceased and the defendant in the writ has manifested his willingness to submit to the mandates of the law and be arrested, then, if the said defendant is killed, the officer will be guilty of manslaughter; and if the blood had time to cool the killing would be murder. 2 *Wharton*, *Crim. Law*, 1030, 1031, and authorities referred to in note.³

If, however, the defendant in the writ only ceases his resistance upon the officer desisting from his attempt to arrest, and still keeps himself in a condition to renew the resistance with a deadly weapon, if the officer should renew the effort to arrest, and the officer cannot make the arrest without great personal danger, he would be justified in killing the defendant. The submission of the defendant in such a case is not complete, and as long as he refuses to be arrested he is in a state of resistance; and if he is armed with a deadly weapon, and has manifested an intent to use it, and still keeps the weapon in his possession convenient for an emergency and the officer has reasonable grounds for believing that the weapon will be used if an arrest is attempted, the officer is not required to risk his life in a rencounter, or desist from an effort to perform his duty. When a person puts himself in an armed and deadly resistance to the process of the law, he becomes virtually an outlaw, and officers are not required to show him the courtesy of a chivalrous antagonist and give him an open field and fair fight. It is only when a criminal submits to the law that it throws round him the mantle of protection and administers justice with mercy. It is the duty of every offender charged with crime in due process of law to quietly yield himself up to public justice. *State v. Bryant*, 65 N. C. 327; *State v. Garrett*, *Winston*, 144.

² Accord: *U. S. v. Jailor*, 2 Abb. 265, Fed. Cas. No. 15,463 (1867); *Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20 (1894); *State v. Gosnell* (C. C.) 74 Fed. 734 (1896); *Lynn v. People*, 170 Ill. 527, 48 N. E. 964 (1897). Contra, where arrest is for a misdemeanor: *Stephens v. Commonwealth*, 20 Ky. Law Rep. 544, 47 S. W. 229 (1898).

³ Accord: *Gosse's Case*, Vent. 216 (1673); *State v. Rose*, 142 Mo. 418, 44 S. W. 329 (1897).

A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, if he resists. If no resistance is offered, the officer ought always, upon demand made, show his warrant to the party arrested, or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of precaution. A defendant is bound to submit to a known officer—to yield himself immediately and peaceably into the custody of the officer before the law gives him the right of having the warrant read and explained. When in resistance, the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the wrong. When a person acts in a public capacity as an officer, it will be presumed that he was rightfully appointed. 1 Wharton, Cr. Law, §§ 1289, 2925; Cooley's Case, 6 Gray (Mass.) 350.

One who is not a known officer ought to show his warrant and read it, if required; but it would seem that this duty is not so imperative as that a neglect of it would make him a trespasser ab initio, when there is proof that the party subject to be arrested had notice of the warrant, and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. *Garrett's Case*, supra.

The law, in its humanity and justice, will not allow unnecessary force to be used in the execution of its process. If a defendant, without any deadly weapon or manifestation of excessive violence, makes resistance, an officer is not justified in willfully shooting him down; but if a defendant has a deadly weapon, and has manifested a purpose to use it if an arrest is attempted, the officer is not bound to wait for him to have an opportunity of carrying his purpose into effect. If the warrant is for a misdemeanor, and a defendant attempts to avoid an arrest by flight, the officer has no right to shoot him down to prevent escape, nor even after an arrest has been made and defendant escapes from custody. *Foster's Case*, 1 L. C. C. 187.⁴

The rule is different in cases of felony. *Bryant's Case*, supra.⁵

If an officer has process in his hands, issuing from a court of competent jurisdiction over the subject-matter, authorizing and commanding him to arrest a defendant, he is entitled to the protection which the law affords officers acting under process, although the process in his hands is informal and irregular. If the process is illegal and void on its face, or is against the wrong person, or its execution is attempt-

⁴ Accord: *Renan v. State*, 2 Lea (Tenn.) 720, 31 Am. Rep. 626 (1879); *Handley v. State*, 96 Ala. 48, 11 South. 322, 38 Am. St. Rep. 81 (1891); *State v. Smith*, 127 Iowa, 534, 103 N. W. 944, 70 L. R. A. 246, 109 Am. St. Rep. 402 (1906).

⁵ Accord: *Carr v. State*, 43 Ark. 99 (1884). "This rule not only applies to the felon himself, but also to those who are seeking to rescue the prisoner." *Deemer, J.*, in *State v. Smith*, 127 Iowa, 534, 103 N. W. 944, 70 L. R. A. 246, 109 Am. St. Rep. 402 (1906).

ed out of the district in which it can alone be executed, then the officer would not be under the protection of the law; but it would seem that, if he kills a resisting party under such circumstances, he would only be guilty of manslaughter, unless he had actual knowledge of his want of authority, or acted from express malice.

I have stated to you many points of law which do not directly arise in the case before us; but it is important that they should be known and well understood in the country where, in recent years, so much violence has been committed—violence in the name of law, and violence in the defiance of law.

The principles of law involved in this case having been explained to you by the court, it is now your duty to ascertain the facts from the testimony and apply them to the law as laid down by the court.

The jury, after a retirement of two hours, found a verdict of "not guilty."

II. ACTS IN FURTHERANCE OF DOMESTIC AUTHORITY.

BRADLEY v. HIS WIFE.

(King's Bench, 1663. 1 Keb. 637.)

3.¹ They refused to bind him to the peace at her suit, unless her life be in danger, because by the law he hath power of castigation; and the Bishop of London had certified he used to beat her, but that she used to provoke him; and that by reason of their wilfulness he could not end their difference, according to the reference of the court last term.

STATE v. OLIVER.

(Supreme Court of North Carolina, 1874. 70 N. C. 60.)

SETTLE, J. We may assume that the old doctrine, that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife, under any circumstances.²

But from motives of public policy, in order to preserve the sanctity of the domestic circle, the courts will not listen to trivial complaints.

If no permanent injury has been inflicted, nor malice, cruelty, nor

¹ The first and second resolutions are omitted.

² Accord: *People v. Winters*, 2 Parker, Cr. R. (N. Y.) 10 (1823); *State v. Buckley*, 2 Har. (Del.) 552 (1838); *Commonwealth v. McAfee*, 108 Mass. 458, 11 Am. Rep. 383 (1871).

While a husband is authorized to defend himself, he is never justified in striking his wife with the hyphen of chastisement as a result of a past injury. See also. 100 N. H. 526.

dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.

No general rule can be applied, but each case must depend upon the circumstances surrounding it.

Without adverting in detail to the facts established by the special verdict in this case, we think that they show both malice and cruelty.

In fact, it is difficult to conceive how a man, who has promised upon the altar to love, comfort, honor, and keep a woman, can lay rude and violent hands upon her without having malice and cruelty in his heart.

Let it be certified that the judgment of the superior court is affirmed.

PER CURIAM. Judgment affirmed.²

GREY'S CASE.

(Old Bailey, 1666. Kelyng, 64.)

John Grey being indicted for the murder of William Golding, the jury found a special verdict to this effect, viz.: We find that the day, year, and place in the indictment mentioned, John Grey, the prisoner, was a blacksmith, and that William Golding, the person killed, was his servant, and that Grey, his master, commanded him to mend certain stamps, being part belonging to his trade, which he neglected to do; and the said Grey, his master, after coming in asked him, the said Golding, why he had not done it, and the said Grey told the said Golding, that if he would not serve him, he would serve in Bridewel, to which the said Golding replied that he had as good serve in Bridewel as serve the said Grey his master; whereupon the said Grey, without any other provocation, struck the said Golding with a bar of iron, which the said Grey then had in his hand, upon which he and Golding were working at the anvil, and with the said blow he broke his skull, of which he died; and if this be murder, etc. This case was found specially by the desire of my Brother Wylde, and I showed the special verdict to all my Brethren, Judges of the King's Bench, and to my Lord Bridgman, Chief Justice of the Common Pleas. And we were all of opinion that this was murder. For if a father, master, or schoolmaster, will correct his child, servant, or scholar, they must do it with such things as are fit for correction, and not with such instruments as may probably kill them. For otherwise, under pretence of correction, a parent might kill his child, or a master his serv-

² Accord: *Bradley v. State*, Walk. (Miss.) 156 (1824).

"It is sickly sensibility which holds that a man may not lay hands on his wife, even rudely. If necessary, to prevent the commission of some unlawful or criminal purpose." *Armstrong, J., in Richards v. Richards*, 1 Grant, Cas. (Pa.) 389 (1856.)

ant, or a schoolmaster his scholar, and a bar of iron is no instrument for correction. It is all one as if he had run him through with a sword; and my Brother Morton said he remembered a case at Oxford Assizes before Justice Jones, then Judge of Assize, where a smith being chiding with his servant, upon some cross answer being given by his servant, he having a piece of hot iron in his hand, run it into his servant's belly, and it was judged murder, and the party executed. And my Lord Bridgman said, that in his circuit there was a woman indicted for murdering her child, and it appeared upon the evidence, that she kicked her and stamped upon her belly, and he judged it murder; and my Brother Twisden said, he ruled such a case formerly in Gloucester Circuit, for a piece of iron or a sword, or a great cudgel, with which a man probably may be slain, are not instruments of correction. And therefore when a master strikes his servant willingly with such things as those are, if death ensue, the law shall judge it malice prepensed.

But if a parent, master, or schoolmaster, correct his child, servant, or scholar, with such things as are usual and fit for correction, and they happen to die, Poulton de Pace, page 120, saith this is by misadventure, and cites for authority, Kelloway, 108, a, b, and 136, a. But that book, which puts this case in Kelloway is 136, a, saith, that if a man correct his servant, or lord his villain, and by force of that correction he dieth, although he did not intend to kill him, yet this is a felony, because they ought to govern themselves in their correction in such ways that such a misadventure might not happen. And I suppose, because the word misadventure is there used, therefore Poulton concludeth (it may be truly) that it is but misadventure.

BOYD v. STATE.

(Supreme Court of Alabama, 1889. 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31.)

SOMERVILLE, J.¹ The defendant, a schoolmaster, being indicted, was convicted of an assault and battery on one Lee Crowder, a pupil in his school, who is shown to have been about 18 years of age. The defense is that the alleged battery was a reasonable chastisement inflicted by the master in just maintenance of discipline, and in punishment of conduct on the part of the pupil which tended to the subversion of good order in the school.

The case involves a consideration of the proper rule of law prescribing the extent of the schoolmaster's authority to administer corporal correction to a pupil.

The principle is commonly stated to be that the schoolmaster, like the parent, and others in foro domestico, has the authority to moder-

¹ Part of this case is omitted

ately chastise pupils under his care, or, as stated by Chancellor Kent, "the right of inflicting moderate correction, under the exercise of a sound discretion." 2 Kent's Com. *203, *206. In other words, he may administer reasonable correction, which must not "exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for the purpose." If he go beyond this extent, he becomes criminally liable, and, if death ensues from the brutal injuries inflicted, he may be liable, not only for assault and battery, but to the penalties of manslaughter, or even murder, according to the circumstances of the case. 1 Archbold's Cr. Prac. *218; 1 Bish. Cr. Law (7th Ed.) §§ 881, 882.

This power of correction, vested by law in parents, is founded on their duty to maintain and educate their offspring. In support of that authority, they must have "a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." 2 Kent's Com. *203. And this power, allowed by law to the parent over the person of the child, "may be delegated to a tutor or instructor, the better to accomplish the purpose of education." Id. *205; 1 Black. Com. *507.

The better doctrine of the adjudged cases, therefore, is that the teacher is, within reasonable bounds, the substitute for the parent, exercising his delegated authority. He is vested with the power to administer moderate correction with a proper instrument in cases of misconduct, which ought to have some reference to the character of the offense and the sex, age, size, and physical strength of the pupil. When the teacher keeps within the circumscribed sphere of his authority, the degree of correction must be left to his discretion, as it is to that of the parent, under like circumstances. Within this limit, he has the authority to determine the gravity or heinousness of the offense, and to mete out to the offender the punishment which he thinks his conduct justly merits; and hence the parent or teacher is often said, *pro hac vice*, to exercise "judicial functions."²

All of the authorities agree that he will not be permitted to deal brutally with his victim, so as to endanger life, limb, or health. He will not be permitted to inflict "cruel and merciless punishment." Schouler's Dom. Rel. (4th Ed.) § 244. He cannot lawfully disfigure him, or perpetrate on his person any other permanent injury. As said by Gaston, J., in *State v. Pendergrass*, 19 N. C. 365, 31 Am. Dec. 416, a case generally approved by the weight of American authority: "It may be laid down as a general rule that teachers exceed the limit

² Accord: *Stepfather, State v. Alford*, 68 N. C. 322 (1873); *master of apprentice, State v. Dickerson*, 98 N. C. 708, 3 S. E. 687 (1887). A brother who provides a sister of 15 years with lodging, clothing, and schooling may inflict moderate correction, *Snowden v. State*, 12 Tex. App. 105, 41 Am. Rep. 667. This doctrine was held in *Donnelley v. Territory*, 5 Ariz. 291, 52 Pac. 368 (1898), not to extend to the patriarch or priest of a community, even though the punishment was inflicted with the consent of the child's parents.

of their authority when they cause lasting mischief, but act within the limits of it when they inflict temporary pain."

There are some well-considered authorities which hold teachers and parents alike liable criminally if, in the infliction of chastisement, they act clearly without the exercise of reasonable judgment and discretion. The test which seems to be fixed by these cases is the general judgment of reasonable men. *Patterson v. Nutter*, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818. The more correct view, however, and the one better sustained by authority, seems to be that when, in the judgment of reasonable men, the punishment inflicted is immoderate or excessive, and a jury would be authorized from the facts of the case to infer that it was induced by legal malice or wickedness of motive, the limit of lawful authority may be adjudged to be passed. In determining this question, the nature of the instrument of correction used may have a strong bearing on the inquiry as to motive or intention. The latter view is indorsed by Mr. Freeman, in his note to the case of *State v. Pendergrass*, 31 Am. Dec. 419, as the more correct. "The qualification," he observes, "that the schoolmaster shall not act from malice, will protect his pupils from outbursts of brutality, whilst, on the other hand, he is protected from liability for mere errors of judgment." *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156, and note pp. 164-167; *State v. Alford*, 68 N. C. 322; *State v. Harris*, 63 N. C. 1.

There was evidence in this case from which the inference of malice could have been deduced as influencing the conduct of the defendant in his chastisement of young Crowder, both as to his outbursts of temper and in the use of improper instruments of correction. Taking, as we must, every reasonable inference which the judge, acting as a jury, could have drawn from the evidence, we take as true, among others, the following facts: That after the severe chastisement administered in the schoolroom the defendant followed Crowder into the schoolyard, and struck him with "a limb or stick," and then "put his hands in his pocket, as if to draw a knife"; that, although Crowder did not strike back, but only protested against and resisted castigation, and, after apologizing for the objectionable language imputed to him, asked permission to withdraw from the school, the defendant, after promising not to strike him, "afterwards struck him in the face three licks with his fist, and hit him several licks over the head with the butt end of the switch." From these blows the eye of the young man was "considerably swollen," and was "closed for several days." The attending physician testified that there were "marks on his head made by a stick, in his opinion." One witness asserts that the defendant declared he "would conquer him (Crowder) or kill him." All the witnesses for the state say that the defendant was apparently very angry all the time, and was very much excited, and after he got through whipping Crowder he remarked, in an excited, angry voice, in the presence of the school and others, that he

"could whip any man in China Grove beat." From this unseemly conduct on the part of one whose duty it was to set a good example of self-restraint and gentlemanly deportment to his pupils, there was ample room for the inference of legal malice, in connection with unreasonable and immoderate correction. Nor was the limb of a tree, of the size indicated by the evidence, nor a clinched fist applied in bruising the pupil's eye, after the manner of a prize fighter, a proper instrument of correction to be used on such an occasion.

The conviction must accordingly be sustained, without assuming any jurisdiction to review the correctness of the judge's finding on the facts.

Affirmed.

III. ACTS IN PREVENTION OF CRIME.

HOWELL'S CASE.

(Worcestershire Eyre, 1221. Select Pleas of the Crown. Sel. Soc. Pl. 145.)

Howell, the Markman, a wandering robber, and his fellows assaulted a carter, and would have robbed him, but the carter slew Howell and defended himself against the others and escaped. And whereas it is testified that Howell was a robber, let the carter go quit thereof. And note that he is in the parts of Jerusalem, but let him come back safely, quit of that death.

STOREY v. STATE.

(Supreme Court of Alabama, 1882. 71 Ala. 329.)

SOMERVILLE, J.¹ The record contains some evidence remotely tending to show that the prisoner was in pursuit of the deceased for the purpose of recapturing a horse, which the deceased had either stolen, acquired by fraud, or else unlawfully converted to his own use.

If the property was merely converted, or taken possession of in such manner as to constitute a civil trespass, without any criminal intent, it would not be lawful to recapture it by any exercise of force which would amount even to a breach of the peace, much less a felonious homicide. *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, Id. 271.

Taking the hypothesis that there was a larceny of the horse, it becomes important to inquire what would then be the rule. The larceny of a horse is a felony in this state, being specially made so by statute, without regard to the value of the animal stolen. Code 1876,

¹ Part of the opinion is omitted.

§ 4358. The fifth charge requested by the defendant is an assertion of the proposition that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing deceased in order to recover the property and prevent the consummation of the felony, the homicide would be justifiable. The question is thus presented as to the circumstances under which one can kill in order to prevent the perpetration of a larceny which is made a felony by statute—a subject full of difficulties and conflicting expressions of opinion from the very earliest history of our common-law jurisprudence. The broad doctrine intimated by Lord Coke was that a felon may be killed to prevent the commission of a felony without any inevitable cause, or as a matter of mere choice with the slayer. 3 Inst. 56. If such a rule ever prevailed, it was at a very early day, before the dawn of a milder civilization, with its wiser system of more benignant laws; for Blackstone states the principle to be that “where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.” 4 Com. 181. The reason he assigns is that the law is too tender of the public peace and too careful of the lives of the subjects to “suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.” It must be admitted that there was far more reason in this rule than the one intimated by Lord Coke, although all felonies at common law were punishable by death, and the person killing, in such cases, would seem to be but the executioner of the law. Both of these views, however, have been repudiated by the later authorities, each being to some extent materially modified. All admit that the killing cannot be done from mere choice; and it is none the less certain that the felony need not be a capital one to come within the scope of the rule. *Gray v. Combs*, 7 J. J. Marsh. (Ky.) 478, 23 Am. Dec. 431; *Cases on Self-Defense* (Horr. & Thomp.) 725, 867; *Oliver v. State*, 17 Ala. 587; *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282.

We find it often stated, in general terms, both by text-writers and in many well-considered cases, that one may, as Mr. Bishop expresses it, “oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon’s existence.” 1 Bish. Cr. Law, §§ 849, 850; *State v. Rutherford*, 8 N. C. 457, 9 Am. Dec. 658. It is observed by Mr. Bishop, who is an advocate of this theory, that “the practical carrying out of the right thus conceded is in some circumstances dangerous, and wherever admitted it should be carefully guarded.” 1 Bish. Cr. Law, § 855.

After a careful consideration of the subject we are fully persuaded that the rule as thus stated is neither sound in principle, nor is it supported by the weight of modern authority. The safer view is that taken by Mr. Wharton, that the rule does not authorize the killing of persons attempting secret felonies, not accompanied by force. Wharton on Hom. § 539. Mr. Greenleaf confines it to “the preven-

tion of any atrocious crime attempted to be committed by force, such as murder, robbery, house-breaking in the nighttime, rape, mayhem, or any other act of felony against the person" (3 Greenl. Ev. 115); and such seems to be the general expression of the common-law text-writers (1 Russ. Cr. 665-670; 4 Black. Com. 178-180; Whart. Amer. Cr. Law, 298-403; 1 East, P. C. 271; 1 Hale, P. C. 488; Foster, 274). It is said by the authors of Cases on Self-Defense, that a killing which "appears to be reasonably necessary to prevent a forcible and atrocious felony against property is justifiable homicide." "This rule," it is added, "the common-law writers do not extend to secret felonies, or felonies not accompanied with force," although no modern case can be found expressly so adjudging. They further add: "It is pretty clear that the right to kill in defense of property does not extend to cases of larceny, which is a crime of a secret character, although the cases which illustrate this exception are generally cases of theft of articles of small value." Cases on Self-Defense (Horr. & Thomp.), 901, 902. This was settled in *Reg. v. Murphy*, 2 *Crawf. & Dix*, C. C. 20, where the defendant was convicted of shooting one detected in feloniously carrying away fallen timber which he had stolen from the premises of the prosecutor; the shooting being done very clearly to prevent the act, which was admitted to be a felony. *Doherty, C. J.*, said: "I cannot allow it to go abroad that it is lawful to fire upon a person committing a trespass and larceny; for that would be punishing, perhaps with death, offenses for which the law has provided milder penalties." This view is supported by the following cases: *State v. Vance*, 17 *Iowa*, 144, *McClelland v. Kay*, 14 *B. Mon. (Ky.)* 106, and others not necessary to be cited. See Cases on Self-Defense, p. 901, note.

There is no decision of this court, within our knowledge, which conflicts with these views. It is true the rule has been extended to statutory felonies, as well as felonies at common law, which is doubtless the correct doctrine; but the cases adjudged have been open crimes committed by force, and not those of a secret nature. *Oliver's Case*, 17 *Ala.* 587; *Carroll's Case*, 23 *Ala.* 28, 58 *Am. Dec.* 282; *Dill's Case*, 25 *Ala.* 15.

In *Pond v. People*, 8 *Mich.* 150, after indorsing the rule which we have above stated, it was suggested by *Campbell, J.*, that there might possibly be some "exceptional cases" not within its influence, a proposition from which we are not prepared to dissent. And again in *Gray v. Combs*, 7 *J. J. Marsh. (Ky.)* 478, 483, 23 *Am. Dec.* 431, it was said by *Nicholas, J.*, that the right to kill in order to prevent the perpetration of crime should depend "more upon the character of the crime and the time and manner of its attempted perpetration than upon the degree of punishment attached by law." There is much reason in this view, and a strong case might be presented of one's shooting a felon to prevent the asportation of a stolen horse in the nighttime, where no opportunity is afforded to recognize the thief or obtain

speedy redress at law. Both the Roman and Athenian laws made this distinction in favor of preventing the perpetration of theft by night, allowing in each instance the thief to be killed when necessary, if taken in the act. 4 Black. Com. 180, 181.

The alleged larceny, in the present case, if it occurred at all, was in the open daylight, and the defendant is not shown to have been unable to obtain his redress at law. Where opportunity is afforded to secure the punishment of the offender by due course of law, the case must be an urgent one which excuses a killing to prevent any felony, much less one not of a forcible or atrocious nature. Whart. Hom. §§ 536-538. "No man, under the protection of the law," says Sir Michael Foster, "is to be the avenger of his own wrongs. If they are of such a nature for which the law of society will give him an adequate remedy, thither he ought to resort." Foster, 296. It is everywhere settled that the law will not justify a homicide which is perpetrated in resisting a mere civil trespass upon one's premises or property, unaccompanied by force or felonious intent. Carroll's Case, 23 Ala. 28, 58 Am. Dec. 282. Clark's Man. Cr. Law, §§ 355-357; Whart. on Hom. § 540. The reason is that the preservation of human life is of more importance than the protection of property. The law may afford ample indemnity for the loss of the one, while it utterly fails to do so for the other.

The rule we have above declared is the safer one, because it better comports with the public tranquility and the peace of society. The establishment of any other would lead to disorderly breaches of the peace of an aggravated nature, and therefore tend greatly to cheapen human life. This is especially true in view of our legislative policy, which has recently brought many crimes formerly classed and punished as petit larcenies within the class of statutory felonies. It seems settled that no distinction can be made between statutory and common-law felonies, whatever may be the acknowledged extent of the rule. Oliver's Case, 17 Ala. 587; Cases on Self-Def. 901, 867; Bish. Stat. Cr. § 139. The stealing of a hog, a sheep, or a goat is, under our statute, a felony, without regard to the pecuniary value of the animal. So would be the larceny of a single ear of corn, which is "a part of any outstanding crop." Code 1876, § 4358; Acts 1880-81, p. 47. It would be shocking to the good order of government to have it proclaimed, with the sanction of the courts, that one may in the broad daylight commit a willful homicide in order to prevent the larceny of an ear of corn. In our judgment the fifth charge requested by the defendant was properly refused.

It cannot be questioned, however, that if there was in truth a larceny of the prisoner's horse, he or any other private person had a lawful right to pursue the thief for the purpose of arresting him and of recapturing the stolen property. Code 1876, §§ 4668-4670; 1 Bish. Cr. Proc. §§ 164, 165. He is not required in such case to inform the party fleeing of his purpose to arrest him, as in ordinary cases.

Code 1876, § 4669. And he could, if resisted, repel force with force, and need not give back or retreat. If under such circumstances the party making resistance is unavoidably killed, the homicide would be justifiable. 2 Bish. Cr. Law, § 647; 1 Russ. Cr. 665; State v. Roane, 13 N. C. 58. If the prisoner's purpose was honestly to make a pursuit, he would not for this reason be chargeable with the imputation of having wrongfully brought on the difficulty; but the law would not permit him to resort to the pretense of pursuit as a mere colorable device beneath which to perpetrate crime.

There are some other questions raised in the record which we do not think necessary to discuss. The judgment of the circuit court must be reversed, and the cause remanded for a new trial. In the meanwhile the prisoner will be retained in custody until discharged by due process of law.

IV. ACTS IN SELF-DEFENSE.

ANONYMOUS.

(Northampton. Eyre. 1330. Fitzh. Abr., Corone. Pl. 284.) ¹

S being indicted for the death of N, and pleading not guilty, the jury found that S and N quarreled on their way to the public house, and in the course of the quarrel N struck S with an ash stick on the head so that he fell, and S got up and ran away as far as he could and N followed S with the stick in his hand to kill him, if he could, and drove him to a wall situated between two houses which he could in no wise pass; and when S saw that N wanted to kill him with the stick, and that he could not avoid death unless he defended himself, he took a certain poleaxe and struck N with it on the head, of which N immediately died, and the said S immediately after fled as far as he could. Wherefore the jurors said that S killed N in self-defense, and not by felony or of malice aforethought, and that he could not otherwise escape from death. Therefore S is remitted to prison to wait for the mercy of the king in the custody of the sheriff. His chattels xx. s., whereof the sheriff is to answer, and then S is to purchase a pardon etc.²

¹ The translation is that given in 3 Stephen's Hist. Cr. L. 38.

² Compare Roberts' Case, Sel. P. C. (Sel. Soc.), pl. 70 (1203), in which it appears that there is doubt at this time as to what is to be done with one who kills in self-defense. The Mirror (page 157) mentions as one of the abuses "that a man who has committed homicide of necessity, or for the peace, or in self-defense, is taken or detained until he has purchased the king's charter of pardon, just as though it were a case of misadventure."

FLOYD v. STATE.

(Supreme Court of Georgia, 1867. 36 Ga. 91, 91 Am. Dec. 760.)

Indictment for stabbing. Motion for new trial. Decided by Judge Holt, Burke superior court, November term, 1860.

Floyd stood conversing with the two Messrs. Brinson. He had open in his hand such a knife as farmers carry, and was perhaps whittling or cleaning his finger nails.

Whilden approached and asked Floyd if he had been accusing him of collecting money for his (Floyd's) slave and stealing it. Floyd said he did. Immediately Whilden struck Floyd with his fist, and Floyd stabbed him, and, pursuing Whilden, who walked backward, continued stabbing him.

Whilden drew his knife. Floyd ran. Whilden caught him and stabbed him. An interval occurred, while each was examining his wounds. Whilden got an ax helve, ran after Floyd (who retreated), and beat him.¹

HARRIS, J. The general rule in criminal law in reference to assaults made on a person, and how they may be repelled defensively, is that contained in the charge of Judge Holt to the jury which tried this indictment: "That whether the stabbing by plaintiff in error amounted to self-defense depended on the nature and violence of the assault made on him." In this case the plaintiff in error received a blow with the fist of the assailant. As it does not appear by the record that there was great superiority in physical strength on the part of the assailant over that possessed by Floyd, nor it appearing that Floyd was in ill health at the time, nor other circumstance existing at the time which produced relatively great inequality between them for sudden combat, we are not able to find any fact in the case which could justify him in repelling the blow of the fist by the use of his knife. As a general rule it may safely be asserted that the law will not excuse or justify a man who repels a blow given him with the fist by stabbing the assailant.

Judgment affirmed.

GOODALL v. STATE.

(Supreme Court of Oregon, 1861. 1 Or. 333, 80 Am. Dec. 396.)

BOICE, J.² The next question in this case arises on the several instructions of the judge as to what would justify the taking of life in self-defense, and all there is on the subject in the instructions may be considered together. After instructing the jury in the language of the

¹ The charge of the trial judge is omitted.

² Only so much of the opinion as relates to self-defense is printed.

statute, the court said: "To justify a killing in self-defense it was necessary that an assault should have been committed by the person killed²; that it was not enough that the party killed had a pistol in his hand, but that there must have been a presentation of it, or some demonstration of shooting." The court also said that "the having a drawn pistol in his hand by deceased would not be enough, although deceased had threatened to take the life of the prisoner, and these threats had been communicated to him."

X I understand, by these instructions, that the court held the law to be that an actual assault with the pistol was necessary to justify the killing, which means that there must have been on the part of the deceased an attempt to shoot the prisoner, and until such attempt was made the prisoner would not have been justified in acting on the defensive and in shooting the deceased, although deceased appeared before him with a drawn pistol and had threatened his life. If such be the law, then there is no such thing as available self-defense—when the assailant makes his attack with a pistol or other kind of firearm; for the assault and discharge of the weapon are simultaneous, or so nearly so, that resistance would be almost impossible. Suppose A, who has threatened the life of B., appears to B. suddenly, at the house of the latter, at an unusual place, armed with a gun, and in a threatening attitude, and B., induced by the previous threats and unusual appearance of his adversary, and believing his own life in imminent danger, and having himself a pistol, shoots A. and kills him, before A. actually makes an attempt to level his gun. Would this be murder? I think not. Such a case, unchanged by other evidence than the killing, would lack all indications of malicious intent, which is necessary to constitute murder.

If B. under such circumstances, acting from appearances, and believing that he was in actual and imminent danger of death or great bodily harm, should kill A., I think he would be justified. By the common law one acting from appearances in such a case, and believing the apparent danger imminent, would be justified, though it afterwards turned out that there was no real danger, and that the gun of the assailant was only loaded with powder. This is, certainly, as strong a case for justification as when one, alarmed in the night by the cry of thieves, rushes forth in the dark, and by mistake kills an innocent person; and in such a case the slayer would be excused at common law. Such was the dictum in the *Levett Case*, which has been approved by the English commentators. 1 East, P. C. 274; 1 Russell on Crimes, 669.

In the case before us there was evidence tending to show that when the prisoner first saw deceased, at the time the fatal shots were dis-

² In *Hoy v. State*, 69 Neb. 516, 96 N. W. 228 (1903), it was held that a person attacked or formidably threatened by three persons may avail himself of the right of self-defense by using commensurate force against the nearest assailant, although it is not from him, but from the others, that harm is feared.

charged, deceased had a pistol in his hand and was standing on the doorstep of the prisoner's private room, which was an unusual place for one who had threatened the prisoner's life, and whom he considered his enemy. And I think the court should have instructed the jury that if they believed, from the evidence in the case, that there was reasonable ground for Goodall to believe his life in danger, or that he was in danger of great bodily harm from the deceased, and that such danger was imminent, and he did so believe, and, acting on such belief, killed the deceased, he was excusable, and that it was not necessary that he should wait until an assault was actually committed.

The whole doctrine of self-defense was most ably examined and illustrated in the case of Thomas O. Selfridge, tried in the Supreme Court of Massachusetts; and the doctrines of that case were adopted in the state of New York in the case of *Shorter v. People*, 2 N. Y. 193, 51 Am. Dec. 286, where it is declared by Bronson, J., in speaking of the same case, "that when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." "To this doctrine," says the learned judge, "I fully subscribe. A different rule would lay too heavy a burden on poor humanity." He further says that the authority of the Selfridge Case was followed by the revisors in framing the statutes of New York touching this question. And our statute is a copy of the New York statute, and, if the doctrine is properly applicable there, then it is applicable here also.³

As to what will constitute reasonable grounds of belief in such cases, sufficient to justify taking life, must depend, to a considerable extent, on the circumstances of each particular case. And the reasonableness of the appearances under which a party claims to justify may very properly be left to a jury, under the instructions of the court. And I think it is going too far to lay down the general rule that an actual assault must be committed; for such a rule would take away, or at least render almost unavailable, the right of self-defense when firearms are used.

It is also assigned as error that the court instructed the jury "that, killing being admitted by the accused, it devolved on him to prove that he was justifiable." I think this instruction in conformity with the common law; but it is not necessary to examine the common-law authorities on this subject, for our statute, in the fourth section of the third chapter, provides: "There shall be some other evidence of malice than the mere proof of killing, to constitute murder in the first or second degree." This, I think, is conclusive on this subject; for it

³ Accord: *Murray v. Commonwealth*, 79 Pa. 311 (1875); *People v. Flahave*, 58 Cal. 249 (1881); *State v. Jones*, 29 S. C. 201, 7 S. E. 296 (1888); *Keith v. State*, 97 Ala. 32, 11 South. 914 (1892); *Enright v. People*, 155 Ill. 32, 39 N. E. 561 (1895); *Godwin v. State*, 73 Miss. 873, 19 South. 712 (1896).

was the evident intention of the Legislature, by this statute, to impose on the prosecution some further burden than the mere proof of the killing to establish the malice, which, under our statute, is not to be presumed from the mere proof of the killing, and I think the instruction of the court was error.

There is another ground of error assigned, which is that the court erred in permitting the declarations of Potts to be given in evidence, made to his son prior to the killing, and declaring the reason why he was going to the house of Aldrich, where he was killed. I think this evidence was improperly admitted, and that the only declarations of the deceased which are competent are dying declarations, or those which are a part of the *res gestæ*.

Judgment is reversed.⁴

ROWE v. UNITED STATES.

(Supreme Court of the United States, 1896. 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547.)

Mr. Justice HARLAN, after stating the case as above reported, delivered the opinion of the court.⁵

We think that these portions of the charge (to which the accused duly excepted) were well calculated to mislead the jury. They expressed an erroneous view of the law of self-defense. The duty of the jury was to consider the case in the light of all the facts. The evidence on behalf of the government tended to show that the accused sought a difficulty with some one; that on behalf of the accused would not justify any such conclusion, but rather that he had the reputation of being a peaceable and law-abiding man. But the evidence on both sides was to the effect that the deceased used language of an offensive character for the purpose of provoking a difficulty with the accused, or of subjecting him to the indignity of a personal insult. The offensive words did not, it is true, legally justify the accused in what he did—the evidence of the government tending to show that “he kicked at deceased, hitting him lightly on the lower part of the leg”; that on the part of the accused tending to show that he “kicked at” the deceased and “probably struck him lightly.” According to the evidence of the defense, the accused then “stepped back, and leaned up against the counter,” indicating thereby, it may be, that he neither desired nor intended to pursue the matter further. If the jury believed the evidence on behalf of the defense, they might reasonably have inferred from the actions of the accused that he did not intend to make a violent or dangerous per-

⁴ Compare *Lander v. State*, 12 Tex. 462 (1854); *Robannon v. Commonwealth*, 8 Bush (Ky.) 481, 8 Am. Rep. 474 (1871); *Stoneman v. Commonwealth*, 25 Grat. (Va.) 887 (1874); *State v. Evans*, 65 Mo. 574 (1877).

⁵ Part of this case is omitted.

sonal assault upon the deceased, but only, by kicking at him or kicking him lightly, to express his indignation at the offensive language of the deceased. It should have been submitted to the jury whether the act of the accused in stepping back and leaning against the counter, not in an attitude for personal conflict, was intended to be, and should have been reasonably interpreted as being, a withdrawal by the accused in good faith from further controversy with the deceased.

If the accused did in fact withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard v. United States*, 158 U. S. 550, 564, 15 Sup. Ct. 962, 39 L. Ed. 1086, in which case it was said: "The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such a force as, under all the circumstances, he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

The charge, as above quoted, is liable to other objections. The court said that both the accused and the deceased had a right to be in the hotel, and that the law of retreat in a case like that is different from what it would be if they had been on the outside. Still, the court said that, under the circumstances, both parties were under a duty to use all reasonable means to avoid a collision that would lead to a deadly conflict, such as keeping out of the affray, or by not going into it, or "by stepping to one side"; and if the accused could have saved his life, or protected himself against great bodily harm, by inflicting a less dangerous wound than he did upon his assailant, or "if he could have paralyzed that arm," without doing more serious injury, the law commanded him to do so. In other words, according to the theory of the charge, although the deceased sprang at the accused, with knife in hand, for the purpose of cutting him to pieces, yet if the accused could have stepped aside, or paralyzed the arm of his assailant, his killing the latter was not in the exercise of the right of self-defense. The accused was where he had the right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was, or believed himself to be, at the moment he fired, is to some extent indicated by the fact, proved by the government, that immediately after he disabled his assailant (who had two

knives upon his person) he said that he (the accused) was himself mortally wounded and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm; and under the circumstances it was error to make the case depend in whole or in part upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him.

Without referring to other errors alleged to have been committed, the judgment below is reversed, and the case is remanded for a new trial.

Reversed.

Mr. Justice BROWN and Mr. Justice PECKHAM dissented.

STATE v. GARDNER.

(Supreme Court of Minnesota, 1905. 96 Minn. 318, 104 N. W. 971, 2 L. R. A. [N. S.] 49.)

JAGGARD, J.,¹ delivered the opinion of the court.

The assignments of error raise many questions as to the correctness of the charge of the court. The court charged, *inter alia*: "But to justify the taking of human life in self-defense it must appear from all the evidence that the defendant not only really and in good faith endeavored to avoid an encounter and to escape from his assailant before the fatal shot was fired. * * * The right to defend himself by taking the life of his assailant would not arise until the defendant had at least attempted to avoid the necessity of such an act; but in this connection I also charge you that when he is assailed or threatened he is not necessarily bound to retreat, and whether, under the circumstances of this case, the defendant was justified in doing what he did, is a matter for you to determine, and not for the court to decide." We are of the opinion that this charge was erroneous in itself (*Perkins v. State*, 78 Wis. 551, 47 N. W. 827; *Shell v. State*, 88 Ala. 14, 7 South. 40), and was not applicable to the facts proved. The common-law doctrine of "retreat to the wall" is thus referred to in a frequently quoted paragraph from Coke (3 Inst. 55): "Some be voluntary, and yet being done upon an inevitable cause are no felony; as if A. be assaulted by B., and they fight together, and before any mortal blow given, A. giveth back until he cometh unto a hedge, wall, or other strait, beyond which he cannot pass, and then, in

¹ Part of the opinion is omitted.

his own defense and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony." The rule on this subject has tended in some American jurisdictions to be enforced with strictness; in others, to be largely modified, in accordance with changed conditions, and, indeed, to be positively relaxed. See *State v. Matthews*, 148 Mo. 185, 71 Am. St. Rep. 598, 49 S. W. 1085; *Runyan v. State*, 57 Ind. 80, 84, 26 Am. Rep. 52. In a leading case (*Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733), after a review of the common-law authorities, in consequence of this confusion in the later cases, the court, *inter alia*, said: "The question then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm." The Supreme Court of the United States approved of this rule and of *Runyan v. State*, *supra*, in 1895, in *Beard v. United States*, 158 U. S. 550, 39 L. Ed. 1086, 15 Sup. Ct. 962.

In *Rowe v. United States*, 164 U. S. 546, 41 L. Ed. 547, 17 Sup. Ct. 172, the defendant, a Cherokee Indian, had an altercation with the deceased at a hotel. After a quarrel at the supper table the accused swore at the deceased and kicked him. The accused then leaned up against the counter, as if, according to his own testimony, he had abandoned the controversy. Immediately the deceased sprang at him with a knife, cutting him. Thereupon the accused shot and killed his assailant. The trial court charged in a carefully qualified way as to the duty of retreat. Mr. Justice Harlan, *inter alia*, said: "The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm; and, under the circumstances, it was error to make the case depend, in whole or in part, upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant, without more seriously wounding him." This accords with the general law on the subject. *Harbour v. State*, 140 Ala. 103, 37 South. 330; *People vs. Newcomer*, 118 Cal. 263, 50 Pac. 405; *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Brown v. Commonwealth*, 86 Va. 466, 10 S. E. 745; *State v. Cain*, 20 W. Va. 679; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792; *Commonwealth v. Selfridge* (1806; Mass.) *Horr. & T. Cas* 1; *Pond v. People*, 8 Mich. 150; *People v. Macard*, 73 Mich.

15, 40 N. W. 784; *State v. Bartlett*, 170 Mo. 658, 59 L. R. A. 756, 71 S. W. 148; *Willis v. State*, 43 Neb. 102, 61 N. W. 254; 25 Am. & Eng. Enc. Law (2d Ed.) p. 272, note 2.

The rule of law in this state is not inconsistent with this conception of the duty to retreat so far as is involved in the case at bar.

The doctrine of "retreat to the wall" had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm. What might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute or by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction.

In the case at bar one of the theories of the state was that the defendant shot Garrison while he was at work leaning over the poles. In this view the charge as to escape was not involved, and the subject should not have been referred to. It became relevant only in the consideration of the defendant's narrative of the tragedy. According to that narrative, the accused knew of the threats made by Garrison to kill him. Garrison was only 30 feet away from his rifle, leaning against the house or a log. Defendant had more than 100 paces to travel before he could reach the poplars surrounding Garrison's curtilage. An attempted retreat finally must have resulted in exposing him to a duel with a dead shot like Garrison. It would not have been reasonable to have required him to have undertaken to reach and take Garrison's gun. Garrison, the larger man, would, as he said, have broken him in two before he could have secured it and protected himself. It was apparently as dangerous for him to retreat as to stand his ground. *Duncan v. State*, 49 Ark. 543, 547, 548, 6 S. W. 164. To use the expression of Chief Justice Gilfillan, referred to, if the jury believed the defendant's narrative, he had no "practicable means to avoid threatened harm by an attempt to escape or retreat. He had no reasonable way open to retreat without increasing his peril." *Harbour v. State*, *supra*. He had "come to a strait." *Coke*, *Inst. supra*. The fact that Gardner carried his gun did not justify giving the instruction. His contention was that this was in accordance with a natural and the general custom of the wild and unsettled wilderness in which he lived. Moreover, as was held in *People v. Macard*, *supra*, a person knowing his life to be threatened and believing himself to be in danger of death or great bodily harm, is not obliged to remain at home in order to avoid an assault, but may arm himself sufficiently to repel anticipated attack and pur-

sue his legitimate avocation; and if, without fault, he is compelled to take life to save himself, he may use any weapon he may have secured for that purpose, and the homicide is excusable. And see *Bohannon v. Commonwealth*, 8 Bush (Ky.) 481, 8 Am. Rep. 474. It was accordingly reversible error, in any view of the case, for the trial court to have charged upon the subject of escape or retreat.

The judgment and order appealed from are reversed, and, in accordance with section 7391, Gen. St. 1894, a new trial is directed.

PEOPLE v. BUTTON.

(Supreme Court of California, 1895. 106 Cal. 628, 39 Pac. 1073, 28 L. R. A. 591, 46 Am. St. Rep. 259.)

GAROUTTE, J.¹ The appellant was charged with the crime of murder, and convicted of manslaughter. He now appeals from the judgment and order denying his motion for a new trial.

For the perfect understanding of the principle of law involved in this appeal it becomes necessary to state in a general way the facts leading up to the homicide. As to the facts thus summarized there is no material contradiction. The deceased, the defendant, and several other parties were camped in the mountains. They had been drinking, and, except a boy, were all under the influence of liquor more or less—the defendant to some extent, and the deceased to a great extent. The deceased was lying on the ground, with his head resting upon a rock, when a dispute arose between him and the defendant, and the defendant thereupon kicked or stamped him in the face. The assault was a vicious one, and the injuries of deceased occasioned thereby most serious. One eye was probably destroyed, and some bones of the face broken. An expert testified that these injuries were so serious as likely to produce in the injured man a dazed condition of mind impairing the reasoning faculties, judgment, and powers of perception. Immediately subsequent to this assault the defendant went some distance from the camp, secured his horse, returned, and saddled it, with the avowed intention of leaving the camp to avoid further trouble. The time thus occupied in securing his horse and preparing for departure may be estimated at from 5 to 15 minutes. The deceased's conduct and situation during the absence of defendant is not made plain by the evidence, but he was probably still lying where assaulted. At this period of time, the deceased advanced upon defendant with a knife, which was taken from him by a bystander, whereupon he seized his gun and attempted to shoot the defendant, and then was himself shot by the defendant and immediately died. There is also some further evidence that deceased ordered his dog to attack the defend-

¹ Part of the opinion is omitted.

ant, and that defendant shot at the dog; but this evidence does not appear to be material to the question now under consideration.

Upon this state of facts the court charged the jury as to the law of the case, and declared to them in various forms the principle of law which is fairly embodied in the following instruction: "One who has sought a combat for the purpose of taking advantage of another may afterward endeavor to decline any further struggle, and, if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the same ground as he might if he had not originally sought such combat for such purpose, provided that you also believe that his endeavor was of such a character, so indicated as to have reasonably assured a reasonable man that he was endeavoring in good faith to decline further combat, unless you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat."

Knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed. He must be notified in some way that danger no longer threatens him and that all fear of further harm is groundless. Yet, in considering this question the assailed must be deemed a man of ordinary understanding. He must be gauged and tested by the common rule—a reasonable man. His acts and conduct must be weighed and measured in the light of that test, for such is the test applied wherever the right of self-defense is made an issue. His naturally demented condition will not excuse him from seeing that his assailant has withdrawn from the attack in good faith. Neither his passion nor his cowardice will be allowed to blind him to the fact that his assailant is running away and all danger is over. If the subsequent acts of the attacking party be such as to indicate to a reasonable man that he in good faith has withdrawn from the combat, they must be held to so indicate to the party attacked. Again, the party attacked must also act in good faith. He must act in good faith toward the law, and allow the law to punish the offender. He must not continue the combat for the purpose of wreaking vengeance, for then he is no better than his adversary. The law will not allow him to say, "I was not aware that my assailant had withdrawn from the combat in good faith," if a reasonable man so placed would have been aware of such withdrawal. If the party assailed has eyes to see he must see, and if he has ears to hear he must hear. He has no right to close his eyes or deaden his ears.

This brings us directly to the consideration of the point in the case raised by the charge of the court to the jury. While the deceased had eyes to see and ears to hear, he had no mind to comprehend, for his mind was taken from him by the defendant at the first assault. Throughout this whole affray, it must be conceded that the

deceased was guilty of no wrong, no violation of the law. When he attempted to kill the defendant he thought he was acting in self-defense, and according to his lights he was acting in self-defense. To be sure, those lights, supplied by a vacant mind, were dim and unsatisfactory, yet they were all the deceased had at the time, and not only were furnished by the defendant himself, but the defendant, in furnishing them, forcibly and unlawfully deprived the deceased of others which were perfect and complete. But where does the defendant stand? It cannot be said that he was guilty of no wrong, no violation of the law. It was he who made the vicious attack. It was he who was guilty of an unprovoked and murderous assault. It was he who unlawfully brought upon himself the necessity for killing the deceased. It cannot be possible that in a combat of this character no crime has been committed against the law. Yet the deceased has committed no offense. Neither can the defendant be prosecuted for an assault to commit murder, for the assault resulted in the commission of a homicide as a part of the affray. For these reasons we consider that the defendant cannot be held guiltless.

Some of the earlier writers hold that one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall, for the reason that the necessity to kill was brought upon himself. 1 Hawkins' Pleas of the Crown, 87. While the humane doctrine, and especially the modern doctrine, is more liberal to the assailant, and allows him an opportunity to withdraw from the combat, if it is done in good faith, yet it would seem that under the circumstances here presented the more rigid doctrine should be applied. The defendant not only brought upon himself the necessity for the killing, but, in addition thereto, brought upon himself the necessity of killing a man wholly innocent in the eyes of the law; not only wholly innocent as being a person naturally non compos, but wholly innocent by being placed in this unfortunate condition of mind by the act of the defendant himself. We conclude, therefore, that the instruction contains a sound principle of law. The defendant was the first wrongdoer. He was the only wrongdoer. He brought on the necessity for the killing, and cannot be allowed to plead that necessity against the deceased, who at the time was non compos by reason of defendant's assault. The citations we have taken from Hale, the Ohio case, and the Nevada case, all declare that the assailant must notify the assailed of his withdrawal from the combat in good faith before he will be justified in taking life. Here the defendant did not so notify the deceased. He could not notify him, for by his own unlawful act he had placed it out of his power to give the deceased such notice. Under these circumstances he left no room in his case for the plea of self-defense.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

BEATTY, C. J., and HARRISON, MCFARLAND, and VAN FLEET, JJ., concurred.

MIERS v. STATE.

(Court of Criminal Appeals of Texas, 1895. 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.)

HURT, P. J.¹ That the arrest was illegal is not questioned. The court so instructed the jury. Being an illegal arrest, what were the rights of the accused under the circumstances? Being without capias in this case, the deceased, a constable, had no right to arrest the appellant, and in making the arrest was a trespasser, and the appellant had the right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts without proper authority, and the person doing the same act who is not an officer, stand on the same footing; and any third person may lawfully interfere to prevent an illegal arrest, doing no more than is necessary for that purpose. *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643; *Commonwealth v. Crotty*, 10 Allen (Mass.) 404, 405, 87 Am. Dec. 669. If deceased, Burnett, had no right to arrest appellant, and if in so doing he was a trespasser, had he the right to retain him in custody? Does the fact that appellant yielded, without resistance, or without protesting against the trespass, make the arrest legal? Does this fact deprive the man falsely imprisoned of the right to assert his rights and regain his liberty, or convert in some mysterious manner the trespass into a lawful act? The affirmative of these questions has no support in principle or reason. Being wrongfully and illegally deprived of his liberty, appellant had the same right to regain it, and right to use the same means, force, or resistance, as he had in preventing an illegal arrest. Being falsely imprisoned, he had the right to his liberty, and, for the purpose of obtaining it, could use all force necessary for that purpose, taking care to use no more than was required. What degree of violence is necessary always depends upon that used or attempted by his adversary. To illustrate: A. is illegally arrested, and attempts to regain his liberty. His adversary proposes to prevent this by the use of deadly weapons. A. may resort to such weapons. A. flees from such arrest. The officer presents, in a shooting position, his gun, demanding of him to halt. A. can shoot, if it reasonably appears to him that the officer will shoot. But if A. is unlawfully arrested, and, being in no danger of violence from the officer, resorts immediately to deadly weapons or great violence (that which is unnecessary to secure his liberty), he would not be justified or excused. He would be guilty (if he should slay the officer) of murder in the first degree, if he, anticipating the arrest, should prepare himself with a deadly weapon and deliberately and calmly form the intention to kill the officer. *Rex v. Patience*, 7 Car & P. 775; *Reg. v. Allen*, 17 Law Times (N. S.) 222. But, express

¹ Part of the opinion is omitted.

malice apart, if A. should use at once, without first resorting to milder means, greater force or violence than was necessary to obtain his liberty, and should kill the officer, he would be guilty of manslaughter. The illegal arrest being a great provocation, the killing would be attributed to the passion arising therefrom. *West v. Cabell*, supra, and authorities there cited. In every case in which the defendant is held guilty of manslaughter, he used more or greater violence or force than was necessary to prevent the arrest or regain his liberty. If the accused used no more force than was necessary, he would be guilty of no offense. Let us suppose that the party slain (be he officer or not) was authorized to make the arrest and detain the accused. If he exercises his authority in a wanton and unnecessary manner, he becomes a trespasser, and if by his acts he creates in the mind of the accused a reasonable apprehension or fear of death or great bodily harm the homicide would be excusable. *State v. Oliver*, 2 Houst. (Del.) 605, 606. If the officer has no authority to arrest, in attempting or making the arrest, he becomes a trespasser, and stands on no better ground than a third party—than if he were not an officer. The arrest being illegal, he has no right to detain the prisoner, and hence no authority to prevent an escape, and in preventing an escape he would still be a trespasser, and stand to the prisoner on the same ground as a private citizen.

Appellant was illegally arrested, and attempted to regain his liberty. The deceased, who was a trespasser, threw his Winchester upon him, covering him with it. Appellant charged his gun while deceased was covering him, and, he still retreating, deceased, with his gun still in a shooting position, demanded of appellant to halt, when they both shot, shooting at the same time; each receiving wounds, and that of deceased's proving mortal. And what is the law applicable to this case? The court should have instructed the jury that the arrest was illegal, and that deceased was a trespasser in making the arrest and detaining the prisoner; that the appellant had the right to regain his liberty, and that deceased had no right to prevent him; and that if deceased, to prevent an escape, threw his gun upon him, commanding him to halt, and that appellant, believing that his life was in danger, or that he was in danger of serious bodily injury, shot and killed the deceased, to acquit him. * * *

Reversed and remanded.²

HENDERSON, J., concurs. DAVIDSON, J., absent.

² Compare *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458 (1885).

V. ACTS IN DEFENSE OF OTHERS.

SNELL v. STATE.

(Court of Appeals of Texas, 1890. 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723.)

WILLSON, J.¹ We are of the opinion that the evidence fairly presents the issue of self-defense as to this defendant. It shows that defendant's brother was in an angry and violent struggle with the deceased; that deceased during the struggle attempted to possess himself of a club—a deadly weapon—with the apparent intention of using it upon defendant's brother; and it was at this juncture that the defendant interposed, secured the club, and struck or attempted to strike the deceased with the same. Up to this act of his it does not appear from the evidence that he engaged in any way in the difficulty between his brother and the deceased. It does not appear that he knew that his brother was using or intending to use a knife in the conflict. It does not appear that he knew or had reason to believe that his brother intended to kill the deceased or to inflict upon him serious bodily injury. On the contrary, the evidence tends to show that the appearances indicated to him that his brother and the deceased were merely engaged in a contest with their fists, neither using or attempting to use a deadly weapon.

Such being the state of the case, when the deceased attempted to possess himself of the club with the apparent purpose of using the same upon his brother, the defendant was justified in interfering in defense of his brother and in securing the club, and even in striking or attempting to strike the deceased with it, if necessary to prevent the deceased from getting and using it.² It is not the intent which actuated the defendant's brother, but the intent with which the defendant acted, which constitutes the criterion in passing upon the issue of guilt in this case. "According to his own act and intent does the law measure him, and hold him guilty of murder, or of manslaughter, or entirely justifiable, as the facts may warrant." And the intent of his brother is immaterial, unless it be shown that the defendant knew or might reasonably have known such intent. *Guffee v. State*, 8 Tex. App. 187; *Sterling v. State*, 15 Tex. App. 249; *Dyson v. State*, 14 Tex. App. 454; *Foster v. State*, 8 Tex. App. 248; *Kemp v. State*, 11 Tex. App. 174; *North v. State*, 12 Tex. App. 111.

In his charge to the jury the learned trial judge did not submit the issue of self-defense. No instruction whatever was given to the jury

¹ Part of this case is omitted.

² Accord: Protection of servant, *Hathaway v. State*, 32 Fla. 56, 13 South. 592 (1893); protection of wife against criminal assault, *Saylor v. Commonwealth*, 97 Ky. 184, 30 S. W. 390 (1895); protection of sister against abduction, *Bedford v. State*, 36 Tex. Cr. R. 477, 38 S. W. 210 (1896).

relating to self-defense, and because of the omission to submit said issue and to properly instruct the jury in relation thereto the charge of the court is fundamentally defective and insufficient (*Bell v. State*, 17 Tex. App. 538; *Meuly v. State*, 26 Tex. App. 274, 9 S. W. 563, 8 Am. St. Rep. 477), and for this reason the judgment is reversed, and the cause is remanded.

Reversed and remanded.

STATE v. GREER.

(Supreme Court of West Virginia, 1883. 22 W. Va. 800.)

JOHNSON, P.¹ Instructions Nos. 5 and 6 are as follows:

"(5) If the jury believe from the evidence that John M. Greer, the brother of the prisoner, was in fault, and by his fault brought about the assault by the deceased upon him, said John M. Greer, then said John M. Greer was bound to retreat as far as he could, unless prevented by the fierceness of the attack threatened by the deceased, before James A. Greer, the prisoner, was justifiable in taking the life of said Robert G. Maguire in order to save the life of John M. Greer, or to protect him from great bodily harm.

"(6) If the jury believe from the evidence that John M. Greer, the brother of the prisoner, provoked the deceased to make an assault upon him, the said John M. Greer, then said John M. Greer was bound to retreat as far as possible, consistent with his own safety at the time, before the prisoner, James A. Greer, was justifiable in killing the deceased to save the life of said John M. Greer, or to protect him, said John M. Greer, from great bodily harm."

The right of self-defense may be exercised in behalf of a brother, or of a stranger. Deitz's Criminal Law, § 126a, and cases cited. What one may lawfully do in defense of himself, when threatened with death or great bodily harm, he may do in behalf of a brother; but, if the brother was in fault in provoking an assault, that brother must retreat as far as he safely can, before his brother would be justified in taking the life of his assailant in his defense of the brother. But if the brother was so drunk as not to be mentally able to know his duty to retreat, or was physically unable to retreat, a brother is not bound to stand by and see him killed or suffer great bodily harm, because he does not under such circumstances retreat. It is only the faultless who are exempt from the necessity of retreating while acting in self-defense. *Cain's Case*, *supra*. Those in fault must retreat, if able to do so. If from the fierceness of the attack or for other reasons they are unable to retreat, they will be excused by the law for not doing so. As a general legal proposition the fifth and sixth instruction propounded the law correctly; but in view of the evidence

¹ Part of the opinion is omitted.

in this case, if the defense had asked it, the instruction should have been modified by inserting the following words: "Unless the jury believe from the evidence that the said John M. Greer was so drunk as to be mentally incapable of knowing that it was his duty to retreat, or physically unable to retreat."

MORRISON v. COMMONWEALTH.

(Court of Appeals of Kentucky, 1903. 24 Ky. Law Rep. 2493. 74 S. W. 277.)

HOBSON, J.¹ The case comes to this: Did Morrison, when he saw Alex Dean committing an assault on his sister, and pushing or striking her against the house, have a right to intervene between the brother and sister for her protection from a simple battery? In 1 Bishop on Criminal Law, § 877, it is said: "The doctrine here is that whatever one may do for himself he may do for another. The common case, indeed, is where a father, son, brother, husband, servant, or the like, protects by the stronger arm the feebler. But a guest in the house may defend the house, or the neighbors of the occupant may assemble for its defense; and, on the whole, though distinctions have been taken and doubts expressed, the better view plainly is that one may do for another whatever the other may do for himself." This statement of the law, as applied to simple batteries and breaches of the peace, is broader than it is usually put in the authorities. Thus, in 3 Bl. Com. 3, it is said: "The defense of one's self, or the mutual and reciprocal defense of such as stand in relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these, his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray." In a note to this it is added: "When a person does not stand in either of these relations, he cannot justify an interference on behalf of the party injured, but merely as an indifferent person to preserve the peace." See, to the same effect, 2 Am. & Eng. Enc. Law, p. 981; 2 Roberson, Criminal Law, § 543.

When a felony is apparently about to be committed, as where there is apparent danger of loss of life by the person assailed, or of great bodily harm to him, a different rule prevails, and there any third person may lawfully intervene for his protection, using such means for his defense as the person assaulted himself may lawfully use. But where the assault is not felonious, and the person intervening does not stand in any of the relations to the one assaulted excepted out of the common-law rule, then he who intervenes can only act for the preservation of the peace. He cannot come into the difficulty for the purpose of taking the place of the person assailed and continuing the

¹ Part of the opinion is omitted.

fight. This is the common-law rule, as we understand the authorities, and we cannot depart from it or extend it.

It is conceded on all hands that Morrison ran down on tiptoe to where Alex Dean and his sister were, some 90 feet away. If, when he got there, he at once stabbed Dean in the back, as stated by the witnesses for the commonwealth, he was the aggressor. The instruction of the court, which submitted to the jury the question whether Morrison believed, or had reasonable grounds to believe, himself in danger of death or great bodily harm at the hands of Dean, when he stabbed him, was more favorable to Morrison than the law warranted, as the court did not submit to the jury the question whether Morrison was the aggressor. Morrison knew that the illicit relations between him and Ida Dean were the foundation of the animosity of Alex Dean to him. He also knew that this was the cause of the quarrel between the brother and sister. With this knowledge he ran on tiptoe down to where they were, armed with a dirk; and if, as he says, he caught Alex Dean by the shoulder and shoved them apart, saying to him, "You can't beat her where I am," his interference was not as an indifferent person to preserve the peace, for his first act was to commit a battery on Alex Dean by taking him by the shoulder, and this was followed up by a declaration which he could but know, under all the circumstances, would make Alex Dean regard him as an assailant. To hold that he intervened, under the evidence, as an indifferent person to preserve the peace, would be to give no real effect to the common-law rule allowing greater rights to parent and child, husband and wife, master and servant, or the like, than to other persons in cases of simple batteries or breaches of the peace. According to his own testimony, the manner of his approach, his conduct on reaching Alex Dean, and his declaration to him, under the circumstances, were not those of one bent on peace, but of one proposing to champion the woman and fight her battles for her. He was, therefore, the aggressor, and the court did not err in refusing to admit the proof as to the bad character of Alex Dean or his previous threats; and this evidence, if admitted, could not have been of material service to the defendant under the view of the law which we have indicated, for the jury might have inferred that, when he interfered with knowledge of the previous threats and the character of Dean, he anticipated the result that ensued. The verdict of the jury finding him guilty of manslaughter, and fixing his punishment at 11 years in the penitentiary, seems to have been due to their accepting the version of the transaction as given by the witnesses for the commonwealth, and their believing that Morrison acted in sudden heat on seeing the woman assailed by her brother.

Judgment affirmed.

NUNN, J., dissents.

*In the common-law, a right to do so as to prevent the commission of a crime
if his wife or daughter. This right is not only of the law, but of the equity
but must be used in a proper manner. See, e.g., *People v. Morrison*, 123/4/5/6*

VI. ACTS IN DEFENSE OF PROPERTY.

HINCHCLIFFE'S CASE.

(York Assizes, 1823. 1 Lew. 161.)

Prisoner was indicted for manslaughter. It appeared that a man and his servant had insisted upon placing corn in the prisoner's barn, which she refused to allow. They exerted force. A scuffle took place, in which the prisoner received a blow on the breast, whereupon she threw a stone at the deceased (the master), who, falling down, was taken up dead.

Per HOLROYD, J. "The case fails on two accounts. ⁽¹⁾ It is not proved that the death was caused by the blow, and, if it had been, it appears that the deceased received it in an attempt to invade her barn against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose, and she is not answerable for any unfortunate accident that may have happened in so doing." Under his lordship's direction, the prisoner was acquitted, and forthwith discharged.

STATE v. MORGAN.

(Supreme Court of North Carolina, 1842. 25 N. C. 186, 38 Am. Dec. 714.)

GASTON, J.¹ Assuming, then, that the constable had wrongfully taken the gun, and that the defendant had a right to require its return, and that exertion of force, nothing short of that which was begun on the part of the defendant, would have availed to compel its return, in our opinion the assault is not justified. It was made with a deadly weapon, which, if used, would have probably occasioned death, and made without any previous resistance on the part of the officer. It was, therefore, an assault with intent to kill. If this intent were lawful, the assault with that intent was lawful. If this intent were unlawful, an assault with that intent cannot stand justified. Now, when it is said that a man may rightfully use as much force as is necessary for the protection of his person or property, it should be recollected that this rule is subject to this most important modification: that he shall not, except in extreme cases, endanger human life or do great bodily harm. It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may rightfully be redressed, by extreme remedies. There is a recklessness, a wanton disregard of humanity and social duty, in taking or endeavoring to take the life of a fellow being, in order to save one's self from a comparatively slight wrong, which is essentially wicked, and which the law ab-

¹ Part of this case is omitted.

hors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. Thus an officer, acting under a legal process, has a right to arrest the person against whom it is directed, and retake him, if he break custody; and for such purpose he may and ought to use necessary force. Yet, if the process be in a civil case, or for a misdemeanor only, and the officer, although he cannot otherwise arrest or retake his prisoner, intentionally kills him, it is murder. 1 Hale, 481; Foster, 271; 1 East, P. C. c. 5. §§ 306, 307. The purpose is indeed rightful, but it is not one of such paramount necessity as to justify a resort to such desperate means. So it is clear that if one man deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide; not because he could take life to save property, but he might take the life of the assailant to save his own. If these principles be right, and we think they cannot be contested, it would follow that, if unfortunately the rage of the defendant in this case had not been pacified, and the fatal blow had fallen and death ensued, it would have been a clear case of murder. If so, then the assault made was an assault with intent to commit murder. A justifiable assault with intent to commit murder is a legal solecism.

This opinion must be certified to the superior court of Henderson, with instructions to render judgment for the state upon the special verdict.

PER CURIAM. Ordered accordingly.²

VII. ACTS IN DEFENSE OF DWELLING.

If anybody in a case of Hamsoken, which is the invasion of a house against the peace of the king, defends himself in his own house, and the invader is killed, he shall remain unpersecuted and unavenged, if he, whom he invaded, could not otherwise defend himself, for it is said he is not worthy to enjoy peace, who is not willing to keep it.

Bracton, f. 144 b.

² Accord: Reg. v. Sullivan, 1 Car. & M. 118 (1841); People v. Horton, 4 Mich. 67 (1856); State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70 (1865); Davison v. People, 90 Ill. 221 (1878); Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039 (1895). Cf. People v. Payne, 8 Cal. 341 (1857).

COOK'S CASE.

(King's Bench, 1639. . 3 Croke, 537.)

Cook was indicted for the murder of Marshal. Upon his arraignment, he pleaded not guilty; and it was found, that the said Marshal was a bailiff to the sheriff of Somerset, and had several warrants upon several *capias ad satisfaciendum* against the said Cook and his father, directed to him and other bailiffs; and that they, by virtue or colour thereof, entered into the said Cook's stable and outhouse, and hid themselves there all night; and at eight of the clock the next morning came to Cook's dwelling-house, and called him to open his doors and suffer them to enter, because they had such warrants upon such writs, at the suit of such persons, to arrest him, and willed him to obey them. But the said Cook commanded them to depart, telling them, they should not enter. And thereupon they brake a window, and afterwards came to the door of the said house, and offered to force that open, and brake one of the hinges thereof. Whereupon the said Cook discharged his musquet at the said Marshal, and stroke him, of which stroke the day following he died. The doubt was, whether upon all this matter he be guilty of murder or manslaughter?

And it was now argued by Rolle, for Cook, that it was not murder; for although a bailiff were slain, yet it was by his own procurement in doing an unlawful act, viz.: in breaking the window and door, and attempting to enter and serve process, which is not lawful for a personal duty, unless in the king's case; and for that purpose he cited 5 Co. 91, b, 92; *Seamain's Case*, 13 Edw. IV.

And after argument at the bar, all the Justices *seriatim* delivered their opinions, that it was not murder, but manslaughter only; for though he killed a bailiff, yet he killed him not in duly executing process: for it is not murder, unless there be *malitia præcogitata*, or *malitia implicita*; as to murder one suddenly, or in resistance of an officer doing his office; but that last ought to be where he is duly executing his office, by serving the process of law, wherein he is assisted *cum potestate regis et legis*: but here this bailiff was slain in doing an unlawful act, in seeking to break open the house to execute process for subject, which he ought not to do by the law; and although he might have entered if the door had been opened and arrested the party, and it had been lawful, yet he ought not to break open the house, for that is not warranted by law and especially lying there in the night, and in the morning breaking the window and offering to force the door, which is not sufferable; for under colour thereof one may enter who hath not any such authority; and every one is to defend his own house. Yet they all held, that it was manslaughter; for he might have resisted him without killing him; and when he saw him and shot voluntarily at him, it was manslaughter.¹

¹ Part of this case is omitted.

FORD'S CASE.

(King's Bench, 1627-31. Kelyng, 51.)

My brother Archer, upon discourse, told me he well remembered the case of Mr. Ford, a Gent., in Gray's Inn, who in the time when Sir Nich. Hyde was Chief Justice, was indicted of murder in the King's Bench, and, upon the evidence, the case was that Mr. Ford, with other company, was in the Vine Tavern in Holborn, in a room, and some other company, bringing with them some women of ill fame, would needs have the room where Mr. Ford was, and turn him out, to which Mr. Ford answered, that if they had civilly desired it, they might have had it, but he would not be turned out by force, and thereupon they drew their swords on Mr. Ford and his company, and Mr. Ford drew his sword, killed one of them, and it was adjudged justifiable.¹

CARROLL v. STATE.

(Supreme Court of Alabama, 1853. 23 Ala. 28, 58 Am. Dec. 282.)

GOLDTHWAITE, J.² We will first consider the questions presented by the refusal of the court to give the charge requested. * * *

A mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as with a deadly weapon. For trespasses with force it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm. If he kills when there is not a reasonable ground of apprehension of imminent danger to his person or property, it is manslaughter, and if done with malice, express or implied, it is then murder.

The rule as to the extent of protection to the dwelling being ascertained, there is but little difficulty in its application to the facts as stated upon the record. It is conceded most fully that, if the evidence shows an assault upon the house or the person under circumstances which would create a reasonable apprehension—that is, a just apprehension in the mind of a reasonable man—of the design to commit a felony with force, or to inflict a personal injury which might result

¹ Seq. qu., Foster, 274.

Accord: Defense of possession of office building by one joint tenant against another, Jones v. State, 76 Ala. 8 (1884).

Compare Dakin's Case, 1 Lewin, C. C. 166 (1828).

² Part of this case is omitted.

in loss of life or great bodily harm, the danger of the design being carried into execution being imminent and present, the person in whose mind such an apprehension is induced, and over whose person or property such danger is impending, may lawfully act upon appearances and kill the assailant. The law in such a case would not require that the danger should be real, that the peril should actually exist; but it does require that the appearances should be such as would excite a reasonable apprehension of such peril, and if such appearances do not exist the killing would be either murder or manslaughter.

Assuming, therefore, that the deceased came to his death by the act of the prisoner, and by the use of a deadly weapon, and in the aspect of the case as presented by the charge requested, the question is simply whether the act was done under the necessity, real or apparent, which the law requires. If it was not, it follows necessarily that the prisoner was guilty either of murder or manslaughter; and, if there was any evidence which tended to show that such necessity existed, the charge requested should have been given. Without referring to the evidence in detail, it is sufficient to observe that the bill of exceptions shows that none was offered of any act of violence on the part of the deceased, either in making the entry into the house, or after it had been made, unless the entry itself, after he had been warned not to enter, might be regarded as an act of violence. When the law speaks of a forcible trespass, it means such a trespass as would amount to a breach of the peace. Entering the house after a warning had been given would have aggravated the trespass; but, if done without force, it would not have been a breach of the peace. The whole evidence, therefore, consisted of the previous threats made by the deceased and the trespass committed by him. The threats, however, did not change the character of the trespass and convert it into a trespass with force. We have seen that, although a forcible trespass upon the dwelling-house may in some cases authorize the killing of the assailant, yet it is not every invasion even of this character upon a man's dwelling which will reduce the killing to manslaughter. The charge requested referred solely to the right of the prisoner to protect the possession of his house, and the circumstances, therefore, must tend to prove a reasonable apprehension on his part of the existence of such a state of facts as would relieve him from the crime of murder. Taken in connection with the evidence, then, the charge asserted the proposition that, where the evidence established only a trespass without force, it tended to create a reasonable apprehension, not only that it was committed with force, but under such circumstances as would be sufficient to reduce the killing to manslaughter. We think there was no error in the refusal of this charge.

There is no error in the record, and the judgment is affirmed.

STATE v. TAYLOR.

(Supreme Court of North Carolina, 1880. 82 N. C. 554.)

Indictment for an affray, tried at fall term, 1879, of Wake superior court, before Avery, J.¹

ASHIE, J. One witness, Bryan Smith, testified that the first he saw was Williams at the door of Taylor's house "cutting or reaching into the door, and Taylor came out striking at Williams with a whip-staff, while Williams was cutting at Taylor with a razor; that Williams walked backwards, cutting with his razor, some 10 or 15 feet from Taylor's door, and Taylor continued to advance upon him with his whip-staff." When a trespasser or unwelcomed visitor invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and, if he does not do so, that he should lay his hands gently upon him; and, if he resists, he may use sufficient force to remove him, taking care, however, to use no more force than is necessary to accomplish that object. But if the intruder defiantly stands his ground, armed with a deadly weapon, the doctrine of "molliter manus" does not apply, and the owner may at once resort to physical force; and it is a question for the jury to decide whether he used more force than was necessary. *State v. Davis*, 80 N. C. 351, 30 Am. Rep. 86.

As Williams was at the door of the defendant's house, reaching in the door and cutting with a razor, and the defendant was striking at him with a staff, we think the jury might have been warranted in coming to the conclusion that it was the purpose of the defendant to expel him from his house, as he had the right to do; and then it would have been a material inquiry for the jury whether the defendant had used more force than was necessary. In this view of the case, it was proper for the jury to ask the court for instructions as to the amount of force that might lawfully be used by the defendant, Taylor, in order to expel Williams from his house; and we are of the opinion it was the duty of the court to give the instructions, and in its failure to do so there was error.

Let this be certified to the superior court of Wake county, that a venire de novo may be awarded to the defendant.

Error. Venire de novo.²

¹ Part of the opinion is omitted.

² "There was, however, asked for accused an instruction to the effect 'that defendant was not required to escape or retreat, but had a right to stand his ground and use such force as was necessary to eject the deceased from his premises, even to taking his life.' That instruction should not have been given, because it implied the right of accused to use necessary force, even to taking life, in order to eject deceased from his premises, who had been invited there, and was then his guest." *Lewis, J., in Eversole v. Commonwealth*, 17 Ky. Law Rep. 1259, 34 S. W. 231 (1896). Accord: *State v. McIntosh*, 40 S. C. 349, 18 S. E. 1033 (1893).

CHAPTER VII.

COMBINATIONS OF PERSONS IN CRIME.

SECTION 1.—PRINCIPAL IN THE FIRST DEGREE.

By what hath been formerly delivered, principals are in two kinds, principals in the first degree, which actually commit the offense; principals in the second degree, which are present, aiding, and abetting of the fact to be done.

So that regularly, no man can be a principal in felony, unless he be present, unless it can be in case of wilful poisoning, wherein he that layeth or infuseth poison with the intent to poison any person, and the person intended, or any other, take it in the absence of him that layeth it, yet he is a principal. * * *

A lets out a wild beast, or employs a madman to kill others, whereby any is killed, A is principal in this case, tho' absent, because the instrument cannot be a principal. Dalt. Cap. 108.

Hale, P. C. c. 55.

REGINA v. MANLEY.

(Somerset Assizes, 1844. 1 Cox, C. C. 104.)

Indictment for larceny.

The facts, as proved by the prosecution, were that the prisoner was an apprentice of the prosecutor; that he had induced the son of the prosecutor, a child of the age of nine years, to take money from his father's till, and give to him. On cross-examination, it further appeared that the child had done the like for other boys.

Cox, for the prisoner, submitted that the evidence did not sustain the indictment. The prisoner was charged with stealing money as principal. The evidence showed him to be either an accessory or a receiver. If an offense be committed through the medium of an innocent agent, the employer, though absent when the act was done, is answerable as a principal. *R. v. Giles*, 1 Moody, C. C. 166; *Reg. v. Michael*, 2 Moody, C. C. 120, 9 Car. & P. 356. But if the instrument be aware of the consequences of his act, he is the principal in the first degree; and the employer, if he be absent when the fact is committed, is an accessory before the fact. *R. v. Stewart*, R. & R. 363. In this case the evidence had shown beyond doubt that the child was of the age of discretion and fully aware of the consequences of his act.

The instrument is a principal in the first degree.

WIGHTMAN, J. What do you mean by an innocent agent, if this child be not one?

Cox: An agent who, from age, defect of understanding, ignorance of the fact, or other cause, cannot be particeps criminis.

WIGHTMAN, J. But though an act done through the medium of an innocent agent makes the prisoner a principal, how do you show that he is not a principal, where the act is done through the medium of a responsible agent?

Cox: Because, if the agent be responsible, he becomes principal; and to constitute a principal he must be the actor or actual perpetrator of the fact, or cognizant of the crime, and near enough to render assistance. Though there be a previous concerted plan, those not present or near enough to aid at the time when the offense is committed are not principals, but accessories before the act. See cases cited Arch. (9th Ed.) p. 4.

WIGHTMAN, J. It is a question for the jury, if the child was an innocent agent.

WIGHTMAN, J. (to the jury). Apart from the consideration of the guilt or innocence of the prisoner generally, if you believe the story told by the child, you will have to determine whether the child was an innocent agent in this transaction—that is, whether he knew that he was doing wrong, or was acting altogether unconsciously of guilt, and entirely at the dictation of the prisoner; for, if you should be of opinion that he was not an innocent agent, you cannot find the prisoner guilty as a principal under this indictment.

Verdict —Not guilty.¹

REX v. DADE.

(Court for Crown Cases Reserved, 1831. 1 Mood. 307.)

The prisoners, except Dade, who had made his escape, were tried before Mr. Justice Littledale, at the last Spring Assizes for the county palatine of Lancaster in the year 1831.

First count was against Jonathan Dade (otherwise Day), Kirkwood, and Stansfield for forging a promissory note whose tenor follows:

"No. 3,534.

Wirksworth and Ashburn, £5.

"I promise to pay the bearer on demand five pounds, here or at Messrs. Smith, Payne & Smith, bankers, London, value received.

"Worksworth, 12th December, 1829.

"No. 3,534.

"For Richard Arkwright & Co.

"Charles Arkwright.

"Entered, William Peat, £5."

¹Accord: *Rex v. Gilles*, 1 Moody, Cr. Cas. 166 (1827); *Berry v. State*, 10 Ga. 511 (1851).

In the offence committed by the perpetration of different felonies, it is not an entire whole, all are guilty of the whole, and the same principle applies.

—with intent to defraud Richard Arkwright and others, and against Collins, Campbell, and Liddy for aiding, abetting, counseling and procuring the said Dade, Kirkwood, and Stansfield to commit said felony and forgery. Second. Same as first, with intent to defraud Samuel Smith and others. Third. Same against Dade only for offering, uttering, disposing of, and putting off said forged note, with intent to defraud said Richard Arkwright and others. Fourth. The like, with intent to defraud said Samuel Smith and others. Fifth. The like, with intent to defraud George Sykes.

In the month of August last Collins and Campbell were desirous that forged notes of the Wirksworth bank should be prepared, and it was agreed by them that a person of the name of Wilson, who was examined as a witness for the crown, should find the "bottoms," which is a slang term used by persons who deal in forged notes to denote paper for making the notes. In the course of that month Wilson told Stansfield there were some people wanting bottoms for making Arkwright's notes.

Stansfield agreed to make the bottoms; 200 were mentioned as being the number wanted.

Bottoms were afterward delivered by Stansfield to Wilson, and Wilson gave him credit for 350, at 4s. apiece, which came to £70; but Stansfield in fact delivered 358 to Wilson. A discussion then took place about the paper being such as was wanted, and Stansfield said he thought they would do when they were completed; that 350 would go.

Stansfield after this had interviews with Dade and Campbell, and they each, at different times, complained of the paper. Campbell got a genuine Wirksworth note, and Wilson sent it to Liddy. After this Wilson gave the bottoms to Campbell to take to Liverpool.

About a week after, Wilson sent the pattern note to Liddy. He (Wilson) saw Kirkwood, and inquired if he was the engraver from Liverpool. Kirkwood asked about Liddy and Campbell, and at last acknowledged that he was the engraver, and what his errand was with Wilson; that it was the Wirksworth notes. He said he had received the £5 note and the bottoms from Liddy; and he said, if Wilson had a mind, he should have the plates, as he was dissatisfied with Liddy and another person whom he mentioned. Some difference occurred between them, Kirkwood and Campbell, and Kirkwood told Wilson he would only deal with him, Wilson.

Wilson had told Dade that there would be such notes, and he would have to fill them up; and Dade said he would do so. After this Wilson went to Liverpool, and saw Kirkwood, who showed him the plate, and said that was the thing that the job was to be done with.

The next day Wilson, Kirkwood, and Campbell were together, and agreed about the price of the notes; that Kirkwood should have £40 for 100 notes. Wilson took 150, and paid Kirkwood £60 for them.

The following day Kirkwood brought 350, and delivered them to

Wilson, in the neighborhood of Liverpool, and Wilson delivered them to Campbell.

Wilson and Campbell then went to Selford, to Dade's house, and delivered the notes to Mrs. Dade.

The next day Dade saw the notes and approved of them; and he was to fill them up by a pattern which Wilson had got from Collins, to let Dade have; and Dade finished the notes off. Dade promised not to deliver any of them till he saw Wilson again. Collins and Campbell were desirous to have some of them when they were ready. This was on the 4th of September. The note in question was proved to be a forgery. (It was proved to be one of Stansfield's make.²) The engraving was proved to be an impression from the plate which Kirkwood showed to Wilson.

The filling up of the note was proved to be in Dade's writing. It did not appear that Stansfield, either before or at the time he delivered the bottom to Wilson, knew that either Dade or Kirkwood had or were to have anything to do with the transaction; neither did it appear that Kirkwood, when he delivered the impression of the plate to Wilson, knew that either Dade or Stansfield had or were to have anything to do with the transaction.

The counsel for the crown referred to the case of *Rex v. Bingley and Others*, Russell and Ryan, 446.

The jury found Kirkwood, Stansfield, Collins, and Campbell guilty; Liddy not guilty.

But the learned judge doubted whether the present case went the length of that, and whether the conviction, as far as related to Kirkwood and Stansfield, was proper; and then, if it was wrong as to them, the conviction of Collins and Campbell, who were charged as accessories before the fact, would fall to the ground also, inasmuch as Dade was not upon his trial.

The learned judge respite the judgment till the next assizes, that the opinion of the judges might be taken.

This case was considered at a meeting of all the judges, except GARROW, B., and PATTESON, J., in Trinity term, 1831; and they were unanimously of opinion that Kirkwood was a principal, and that the conviction was right.¹

REGINA v. JEFFRIES.

(Central Criminal Court, 1848. 3 Cox, C. C. 85.)

The prisoners were indicted for larceny in a dwelling house. It appeared that Jeffries was clerk to one Whittock, the prosecutor, who was a coal dealer. The prosecutor's money chest was kept in

¹ Compare *Rex v. Manners*, 7 Car. & P. 801 (1837); *Reg. v. Charles*, 17 Cox. C. C. 499 (1892).

a room adjoining the office, and of the door of this room the prisoner Jeffries had a key. On the night of the larceny he was proved to have unlocked the door and then gone away. About 20 minutes afterwards the prisoner Bryant came to the room and removed the money chest. It was attempted to be shown, on the part of the prisoner Jeffries, that he was three-quarters of a mile from the prosecutor's premises at the time Bryant was there.

CRESSWELL, J., told the jury that where one person opens the door of a house which contains the articles stolen, and then goes away, and another in his absence, but acting in concert with him, enters the house and commits the larceny, the one who opens the door is not guilty as a principal in the act.

Greaves, for the prosecution, submitted that Jeffries was guilty of a joint larceny, although he was not actually present at the time of the removal by Bryant. In the case of burglary, where the breaking is in one night and the entry the next night, a person present at the breaking, though not present at the entering, is in law guilty of the whole offense. *Rex v. Jordan*, 7 C. & P. 432.

CRESSWELL, J., said he would consult Mr. Justice PATTESON, sitting in the Nisi Prius Court. On his return, he said Mr. Justice PATTESON agreed with him, and entertained no doubt on the point; and accordingly

CRESSWELL, J., directed the jury, if they believed that Jeffries was not present assisting Bryant at the time of the removal of the chest, to acquit him.

SECTION 2.—PRINCIPAL IN THE SECOND DEGREE.

GRIFFITH'S CASE.

(Reporter's Note, 1553. 1 Plow. 97.)

Note (Reader) that the said case in 40 Ass. pl. 25, proves that the law anciently was, that those who were present and abetting were not Principals, but Accessories, as the Lord Bromley said before, for the book is, that four were appealed as Principals, and the others of Presence, Force, and Aid. And also in Mich. 40 Edw. III, 42, it appears that one William de C. was appealed for that he was aiding, present, and commanding one T., who on a certain Day killed W. de R., Husband of the Wife; and because the Principal was not attainted by Exigent, nor in other manner, the defendant was let to Mainprize, and afterward the Principal was attainted by Exigent, and then W. was put to answer. * * * But of late time the Law has been held contrary in this point, for now they are taken to be Principals by all the Sages of the law * * * and in the Years

of Henry IV, the Reader may see the law often adjudged accordingly, viz., that those who are present and abetting to do the Act are Principals, as well as he that does it. And it seems the Law was so changed in the Time of the said King Henry IV, when the former course was reproved and corrected in this point.

BANSON v. OSSLEY.

(King's Bench, 1686-87. 3 Mod. 121.)

An appeal of murder was tried in Cambridgeshire against three persons, and the count was, that Ossley assaulted the husband of the appellant and wounded him, in Huntingdonshire, of which wound he languished and died in Cambridgeshire, and that Lippon and Martin were assisting.

The jury found a special verdict, in which the fact appeared to be, that Lippon gave the wound, and that Martin and Ossley were assisting.

The first exception to this verdict was, That the count and the matter therein alleged must be certain, and so likewise must the verdict, otherwise no judgment can be given; but here the verdict finding that another person gave the stroke, and not that person against whom the appellant had declared, it is directly against her own showing.¹

THE COURT answered to the first exception, that it was of no force, and that the same objection may be made to an indictment, where in an indictment if one gives the stroke and another is abetting, they are both principally and equally guilty; and an indictment ought to be as certain as a count in an appeal.²

THORNTON v. STATE.

(Supreme Court of Georgia, 1903. 19 Ga. 437, 46 S. E. 640.)

FISH, P. J.³ If Thornton had given his pistol to Amos, with instructions or advice to kill Sam Gordon with it, and Amos had done so when Thornton was present, and nothing more had appeared, then Thornton would have been guilty as principal in the second degree. The evidence for the state shows, however, that when Thornton loaned his pistol to Amos he told, or advised, him to kill Gordon with it, if he should again rob Amos at cards. His advice or instruction to

¹ The second exception is omitted.

² Accord: *Doan v. State*, 26 Ind. 495 (1866); *Commonwealth v. Kern*, 1 Brewst. (Pa.) 350 (1867); *State v. Hess*, 65 N. J. Law, 544, 47 Atl. 806 (1900).

³ Part of the opinion is omitted.

kill Gordon was, therefore, conditional, or dependent upon the event that Gordon should again rob Amos at cards. Even granting that there was enough in the evidence to authorize the jury to infer that Amos and Gordon had, subsequently to the loan of the pistol, engaged in playing cards, we think there is nothing in the evidence from which the jury could fairly infer that Gordon had robbed Amos in such a game, or that the killing was in consequence of such robbery. Of course, we do not use the words "robbed" and "robbery" here in their limited legal sense, but as including cheating in a game of cards played for money. The evidence shows that Amos stated to Gordon that he owed him a dime. This Gordon denied, but paid it, saying at the time that he would make some of them shoot him; whereupon Amos immediately shot and killed him. From these facts we do not think it can be successfully contended that the evidence shows that, at the time of the homicide, there was in the mind of Thornton the same criminal intent and felonious design that was in the mind of Amos. The common intent and purpose in the minds of both, at the time that Thornton furnished Amos with the pistol, was that Amos should kill Gordon if the latter should again rob him at cards. There is nothing in the evidence to show, or to authorize the jury in finding, that Thornton ever had any other criminal intent. If Amos, after procuring the pistol from Thornton, had casually met Gordon and immediately shot him, without any provocation whatever, certainly Thornton would not have been guilty of murder as a principal in the second degree, although he had been present on the occasion of the homicide, if he did nothing then to aid or abet the commission of the crime.² It follows from what we have said that the court should have granted a new trial, upon the ground that there was no evidence to support the verdict.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

²Accord: *Connaught v. State*, 1 Wis. 159, 60 Am. Dec. 370 (1853); *People v. Ah Ping*, 27 Cal. 489 (1865); *Plummer v. Commonwealth*, 1 Bush (Ky.) 76 (1866); *Clem v. State*, 33 Ind. 418 (1870); *State v. Cox*, 65 Mo. 29 (1877); *Reg. v. Coney*, 8 Q. B. Div. 534 (1882); *White v. People*, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196 (1891); *State v. Wolf*, 112 Iowa, 458, 84 N. W. 536 (1900).

Compare *McCarty v. State*, 26 Miss. 299 (1853); *Leslie v. State*, 42 Tex. Cr. R. 65, 57 S. W. 659 (1900). In *Ramon v. State* (Tex. Cr. App.) 68 S. W. 987 (1902), it was held that the fact that defendant, knowing that C. was about to kill deceased, held the son of the deceased from going to his father's assistance, would not make defendant a principal in the second degree to the homicide.

"The words 'or approving of' have no place in legal phraseology to explain the meaning of the words to 'aid' and 'abet.' The fact itself is incapable of proof. Mental operations, not accompanied with any action or language, are beyond the reach of testimony." *Napton, J.*, in *State v. Cox*, 65 Mo. 29 (1877).

STATE v. POYNIER.

(Supreme Court of Louisiana, 1884. 36 La. Ann. 572.)

MANNING, J. Poynier, with four others, was prosecuted for larceny of 32 bales of cotton, the property of the Texas & Pacific Railway, and, upon conviction, was sentenced to four years' imprisonment at hard labor. He alone is before us on this appeal.

By request of the prisoner's counsel, the judge charged that "persons not sufficiently near to give assistance are not principals. That they were sufficiently near must be proven by the state beyond a reasonable doubt. If a man be at such distance from the place where the offense was committed that he could not assist in it if required, he cannot be deemed a principal." And then immediately added: "Where a person keeps away from the place where the crime is committed for the purpose of facilitating the commission of the offense, even if he be not sufficiently near to give assistance if required, he is to be considered as constructively present."

This addendum of the judge was excepted to by the prisoner, and presents the question for our review. In his reasons for the charge, inserted in the bill of exceptions, the judge says: "The accused was a foreman of the Texas & Pacific Railway at their freight depot in this city. I charged the jury that if the evidence established a combination on the part of the accused and others to steal the 32 bales of cotton, and that Poynier, with the view of assisting the actual perpetrators of the larceny, kept out of the way, he was guilty as principal."

The counsel for the prosecution lays stress on the circumstance that this last enunciation was not excepted to. How could it be? It was not a charge to the jury, but an amplification of the charge previously given, and not appearing until the bill was ready to be signed, and appearing only in it. The jury never heard or read it. The charge to them is the matter for our consideration.

The distinction between principals and accessories before the fact is in most cases a distinction without a difference, and often requires nice and subtle verbal refinements to express it. In some of our states it has been abolished by statute; in others, judicial decisions have attenuated it until it is perceptible only by a close mental effort. The fact is, it is not a creature of statutory law, but wholly of judicial construction, the origin of which is so vague and indeterminate that the text-writers have not found out where to place it. It is supposed to have originated at a time when criminal lawyers puzzled their wits and taxed their ingenuity to invent metaphysical shades of distinction, such, for instance, as that between principals and accessories at the fact, which once existed, but is now exploded. The distinction between principals and accessories before the fact is fast following its kindred technical refinement.

The general rule of law is that what one does through another's agency is to be regarded as done by himself. In the punishment, neither the common nor statutory law makes any distinction between a principal and an accessory before the fact, nor is there any difference in the structure of the indictment. In morals there are oftentimes circumstances wherein we attach greater blame to the accessory than to his principal, as where a husband commands his wife to do for his benefit a criminal act which she would not do without his command. 1 Bishop, Crim. Law, § 673.

A man whose sole will procures the commission of a criminal act is principal, without regard to the physical agencies he employs, and whether he is present or absent when the act is done. Where there is a principal—and there can be no crime without one—no other person will be considered a principal with him, unless in a position to render personal assistance of some kind. The test to determine whether he is principal rather than accessory is whether he is so situated as to make his personal help available—not actual physical help necessarily, but help of any kind; not help rendered in or by actual presence, but constructive presence as well. *Id.* § 653. Thus, if he watched near or at a distance to prevent his companions being surprised, or stationed himself to give the alarm to favor their escape, or was in such situation as to come to their assistance, so that the knowledge of his watching or position or situation inspired or was calculated to inspire his companions with additional confidence, and enable them quicker or safer or more effectually to commit their crime, then he is a principal. 1 Whart. Am. Cr. Law, § 116.

One need not be either an eyewitness of the criminal act or within hearing of it, to make him a principal. If he had knowledge of it, and watches so as to assist in any manner, it is enough. *Doan v. State*, 26 Ind. 495. Or if he do any act in execution of the common design, or to aid those who are immediately engaged to escape. *Wixson v. People*, 5 Parker, Cr. R. (N. Y.) 119. Each person consenting to the commission of an offense, and doing any one act which is an ingredient in the crime, or immediately connected with or leading to its commission, is a principal. *U. S. v. Wilson*, Baldw. 78, 102; *U. S. v. Libby*, 1 Woodb. & M. 221.

Therefore, if a person, with knowledge that the commission of the crime has been determined on, gets away and keeps away from the spot for the purpose of facilitating the commission of it, he is a principal, although he is not present or near enough to give assistance physically and manually to his companions. And this is but a paraphrase of the judge's charge. *Reg. v. Flatman*, 42 L. Crown Cas. Reserved, 159.

It was for the jury to find the fact whether the defendant had formed a combination to steal the cotton, and whether he had kept out of the way to assist his confederates. They found the fact, and

applied the law as the judge gave it to them, and a conviction thus had is legal.

There is a bill to the admission of Poynier's confession which is without merit. The confession was voluntary, and therefore admissible. *State v. Alphonse*, 34 La. Ann. 9.

The third bill is to a question of the state's attorney in cross-examination. The defendant asked a witness: "Are you the person who is charged with having knowingly received the stolen cotton spoken of in this case?" And again: "Did you buy 32 bales of cotton, or any cotton, from the accused, Poynier?" Upon cross-examination he was asked: "How do you account for the tags which had been attached to the cotton which was found in your pickery?" The objection was that the cross-examination must be confined to the facts and circumstances which were the subject of the examination in chief.

The answer is that the question is sufficiently connected with the matter that had been brought out before to justify its admission under our ruling in *State v. Stuart*, 35 La. Ann. 1015.

Judgment affirmed.

TODD, J. (dissenting). The common law recognizes two kinds of principals to a crime—principals in the first and second degree.

A principal in the first degree is the actual perpetrator of the deed, either in person or through an innocent medium or irresponsible agent. Wharton, Cr. Law (4th Ed.) § 112; 1 Hale, 233, 615; Bishop, Cr. Law (5th Ed.) §§ 648, 651; 1 Arch. Cr. Pr. & Pl. (7th Ed.) 58.

Principals in the second degree are those who are present, aiding, and abetting at the commission of the fact. 1 Hale, 438, 439; Foster, 349, 350; Wharton, Cr. Law (4th Ed.) 116; Bishop (5th Ed.) § 649.

This presence is either actual or constructive. Thus it is a constructive presence if a party watches for his companions, the actual perpetrators, to prevent surprise or favor their escape, or give assistance, and is near enough to afford it, if required. Wharton (4th Ed.) §§ 116, 124; Hale, 438; 1 Arch. pp. 58, 59; Bishop, § 653.

If a person is present aiding and abetting in some act making part of the offense, although absent when the crime is completed by his confederates, he is a principal with respect to the whole of it. 1 Arch. Pr. & Pl. pp. 61, 66; *Reg. v. Jordan O'Sullivan*, 7 C. & P. 432.

These leading authorities shed all necessary light on the question as to who are to be held as principals in a crime, whether in the first or second degree. The doctrine upheld by these authorities still governs in this state, except that the distinction or difference between principals in the first and second degree can scarce be said to be any longer recognized.

In the instant case the trial judge, after charging the jury in exact accord with the principles adverted to above, further charged, substantially, that although a party may be absent from the place where the crime is committed, and such a distance therefrom as not

to be able to render any assistance if required, yet, if his absence is for the purpose of facilitating the commission of the offense, he is a principal, and is constructively present aiding and abetting.

The question recurs: Does the proposition conveyed in this charge fall within, or is it covered by the doctrine established by, the authorities cited, or is it justified and sanctioned by any known rule or principle of law?

After an exhaustive examination of all authorities on the subject, and the minutest consideration, I am constrained to answer this question in the negative. So far from being supported by authority or precedent, I think it opposed to the controlling principles referred to, and really inconsistent with the first part of the charge given to the jury, and the law therein so clearly enunciated.

If it should prevail, it would effectually, in my opinion, destroy the distinction so firmly established between principals and accessories before the fact.

To constitute a party a principal in the crime in any degree, he must be a co-operator therein at the time of its commission.

Thus it is laid down by Archbold that going towards or in the direction of a place where a larceny is committed for the purpose of assisting in carrying off the property, and assisting accordingly, but at such a distance as not to be able to assist in the commission of the fact, at the time of the felonious taking and carrying away, did not make the party a principal in the larceny. Archbold, Cr. Pl. & Pr. p. 66.

And in the case presenting a strong analogy to the instant one, where an employé in a house, in pursuance of an arrangement made with a confederate, admitted this confederate into the house, where he remained till the next day, when he stole the money from a cashbox in the house, during the absence of the employé therefrom, it was held that the latter was not a principal in the crime, but an accessory before the fact. *Reg. v. Jackwill and Perkins*, 1 Car. & M. 215.

Reference is made in the brief of the Attorney General to two cases as supporting the principle announced in the charge we are considering. These are *Reg. v. Flatman*, 42 L. T. (Eng.) 159, and *Scales v. State*, 7 Tex. App. 361.

The first of those cases turned on the effect to be ascribed to the delivery by the wife of the husband's goods to an adulterer and did not involve the general principles governing the point or question under review.

And the other case was decided under a special statute of the state of Texas, which changed materially the common law on the subject of principals and accessories. See Peck, Dig. art. 1809 et seq; Pen. Code, art. 214 et seq.

I am thus brought to the conclusion that there was an error in the charge complained of, and of gravity sufficient to vitiate the verdict of the jury, and the sentence based thereon.

I therefore dissent from the opinion of the majority.

MERCERSMITH v. STATE.

(Court of Appeals of Texas, 1880. 8 Tex. App. 211.)

WHITE, P. J.¹ In our opinion this cause must be reversed, because the court failed to submit the law applicable to the vital issues necessarily raised by the evidence elicited on the trial. Substantially stated, the facts in brief are that one George Purtell and the defendant were found by deceased inside his house sometime about 11 o'clock at night. Deceased and his wife and stepdaughter were returning from prayer meeting, when, near his house, they heard the cries and screams of the three children, who had been left at home during their absence. Deceased hurried on to see what the matter was, when, stepping inside his door, he was immediately fired upon by Purtell. After the second shot, deceased fled, and Purtell pursued him into the yard and fired a third shot, or fourth, according to some of the witnesses, which penetrated about the knee joint, severing the femoral artery, and from which wound he died some 14 days afterwards.

At the time of the shooting this appellant was lying upon a pallet upon which the three children slept, and had the eldest, a young girl between 10 and 12 years of age, in his arms, with her clothes up, and, as she says, was choking her. She and the other children were crying and hallooing. The door of the house had been broken down and torn from its hinges by Purtell and defendant when they effected their entrance into the house, and immediately after the entry defendant laid down upon the pallet with the children, whilst Purtell remained standing near the doorway. But a very few seconds could have elapsed from their entry until the appearance of Henderson, the deceased, and the shooting as above detailed. There was evidence tending to show that these parties had been at the house before to see the girls (the one defendant had in his arms when discovered, and the stepdaughter who had gone to prayer meeting); the intimation being clear that their object on these previous visits was carnal intercourse. Whether such carnal intercourse had taken place previously is not made manifest. Other evidence tended to show that this defendant was quite drunk; but after the shooting he got up and joined Purtell, when they both mounted their horses and went off together.

In a charge characterized by great precision for its declaration of the principles of law relative to murder of the first and second degrees, the court further instructed the jury fully with regard to the general principles of law as enunciated in the Code with regard to joint or principal offenders engaged in a common purpose and actuated by a common design in the accomplishment of an unlaw-

¹ The opinion only is printed.

ful act, and their reciprocal liability for the acts of each other. Pen. Code, arts, 74-76, 78. But the charge failed to draw the distinction which the law makes between cases of combination and conspiracy to do an unlawful act and the liability of one and all for the acts and deeds of all when the common purpose might be to do an act not in itself unlawful, and in the execution of which one of the parties engaged committed a felony.

In the case at bar there would be a marked distinction as to the liability of the parties when tested by what was the common purpose which united them together at the time Purtell alone engaged in the shooting which resulted in the homicide.

If the common purpose was to commit an unlawful act—as, for instance, burglary—which would be evidenced by the fact that they broke down the door and forcibly entered the house at night, or that they broke down the door and forcibly entered the house to commit rape (Pen. Code, art. 704), then, manifestly, the original purpose and common design being to commit a felony, any act done by either one of the parties whilst engaged in the unlawful act would be imputed and attach its criminality to the other, and make each liable jointly for whatever either may have done in the general purview of the common design during the execution of the original unlawful enterprise.² But if the common undertaking was in itself not unlawful—as, for instance, if the parties entered the house, but in the entry did not intend to commit burglary or any other felony or unlawful act, but their object was alone to have carnal intercourse with the girls, with whom they had before such intercourse, and whilst the defendant was in the act of accomplishing this object his companion, Purtell, without his knowledge or consent, shot and killed Henderson—in such event, even though the shooting might have been done to enable both to evade discovery and effect their escape from the house, the defendant would not be liable for the homicide.

It is the lawfulness or criminality of the purpose and common design which gives scope and character to acts committed in connection with its perpetration. To constitute principals in an offense, the purpose must be unlawful. "For if the original intention was lawful and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case, but the other persons who are present, and who do not actually aid and abet, are not guilty as principals; for they assembled for another purpose, which was

² Accord: *Rex v. Plummer*, Kelyng, 109 (1701); *U. S. v. Ross*, 1 Gall. (U. S.) 624, Fed. Cas. No. 16,196 (1813); *State v. Maloy*, 44 Iowa, 104 (1876); *Weston v. Commonwealth*, 111 Pa. 251, 2 Atl. 191 (1885); *Gibson v. State*, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96 (1889); *English v. State*, 34 Tex. Cr. R. 190, 30 S. W. 233 (1895); *State v. Cannon*, 49 S. O. 550, 27 S. E. 526 (1897).

lawful, and consequently the guilt of the person actually killing cannot by any fiction of law be carried against them beyond their original intention." Fost. 354; 2 Hawk. P. C. c. 29, § 9; 2 Archb. Cr. Pr. & Pl. (6th Ed.) 251-257, and note.

But Mr. Wharton says: "It should be observed, however, that, while the parties are responsible for collateral acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals. Thus, if one of the party of his own head turn aside to commit a felony foreign to the original design, his companions do not participate in his guilt." Whart. on Hom. § 202.³ Yet, "where two persons go out for the common purpose of robbing a third person, and one of them, in pursuit of such common purpose, kill such third person under such circumstances as to make it murder in him who does the act, then it is murder in the other." Id. § 338; *Ruloff v. People*, 45 N. Y. 213; *Green v. State*, 13 Mo. 382; 1 Bishop's Cr. Law (4th Ed.) § 435; *Hanna v. People*, 86 Ill. 243.

Nor is it necessary that the common guilty purpose of resisting to the death any person who should endeavor to apprehend them must have been formed when the parties went out with the common design of committing the unlawful act, to render all principals in a murder by one of them perpetrated whilst making such resistance. *Ruloff v. People*, 45 N. Y. 213; *State v. Nash*, 7 Iowa, 350; *Moody v. State*, 6 Cold. (Tenn.) 299.

In the case of *People v. Knapp*, 26 Mich. 112, it was held "that where parties combine to commit an offense, and a homicide is committed by part of them in an attempt to escape, one who did not consent and was not privy in fact to the homicide cannot be held responsible by reason of the original combination. There can be no responsibility against one who is not himself engaged in the acts of his associates, unless it is within the scope of the combination to which he was a party, and thus authorized as his joint act."

It is unnecessary that we should discuss the other questions in the case.

The judgment of the court below will be reversed, in order that upon another trial the court may submit the principles of law applicable to the issues as we have presented them in the foregoing opinion.

Reversed and remanded.

³Accord: *Scott v. State*, 46 Tex. Cr. R. 536, 81 S. W. 294, 108 Am. St. Rep. 1032 (1904).

STATE v. ALLEN.

(Supreme Court of Errors of Connecticut, 1879. 47 Conn. 121.)

Indictment for murder in the Superior Court for Hartford county. The prisoner was indicted with Harry Hamlin and John H. Davis for the murder of Welles Shipman, a watchman at the state prison; the murder having been committed in an attempt of the defendant and Hamlin, who were convicts, to escape from the prison. The jury found a verdict of murder in the first degree. The defendant thereupon moved for a new trial for error in the rulings and charge of the court, and also filed a motion in error.¹

BEARDSLEY, J. The motion for a new trial shows that upon the trial it was claimed by the state that the accused and one Henry Hamlin, both of whom were lawfully confined in the state prison, conspired to escape from such confinement, and to use all means which might become necessary to effect such escape, even to the taking of the life of any one who might oppose them, should it become necessary to do so in order to overcome such opposition; that in pursuance of such combination they provided themselves with two loaded revolver pistols, one a seven-shooter, and the other a four-shooter, and with handcuffs and a gag, and on the evening of September 1, 1877, escaped from their cells and secreted themselves in the hall of the prison, where they were discovered by Welles Shipman, an armed night watchman of the prison, and that thereupon they both fired at Shipman, who was wounded by one of the shots, and died from such wound on the next day; and that after Shipman was wounded he ran towards the alarm bell, pursued by the accused and Hamlin, who overtook him, when he sank insensible upon the corridor, and was then handcuffed and gagged by them; that Allen then went to his cell about 150 feet distant, leaving Hamlin with Shipman, where he was discovered and fired at by the guard of the prison; and that thereupon Hamlin went to the cell of Allen, and that both then broke into the attic and were taken the next morning. The state claimed that Shipman was shot before he was handcuffed.

It was claimed by the defense that, if there was any conspiracy between the accused and Hamlin, it was merely to bribe an officer of the prison to permit them to escape, and that whatever was done after Shipman discovered the accused and Hamlin was not in pursuance of any plan or conspiracy, and that immediately after Shipman was handcuffed and gagged Allen abandoned the enterprise and went to his cell, and that Shipman was afterwards shot by Hamlin alone.

The court charged the jury as follows: "If the jury shall find that Hamlin and Allen, at some time previous to the homicide, made up their minds in concert to break the state prison and escape there-

¹ The statement is abridged, and part of the opinion is omitted.

from at all hazard, and knowing that the enterprise would be a dangerous one and expose them to be killed by the armed night watchman of the prison, should they be discovered in making the attempt, willfully, deliberately, and premeditatedly determined to arm themselves with deadly weapons, and kill whatever watchman should oppose them in their attempt, and if the jury should further find that in pursuance of such design they armed themselves with loaded revolvers to carry their original purpose into execution, and while engaged in efforts to escape from the prison were discovered by the watchman, Shipman, the deceased, and in the scuffle which ensued he was willfully killed by Hamlin or Allen while they were acting in concert and in pursuance of their original purpose so to do in just such an emergency as they now found themselves in, then Hamlin and Allen are both guilty of murder in the first degree. And in the opinion of the court Allen would be guilty of murder in the first degree, if, in the state of things just described, he in fact abandoned, just before the fatal shot was fired by Hamlin, all further attempt to escape from the prison, and the infliction of further violence upon the person of Shipman, without informing Hamlin by word or deed that he had so done, and Hamlin, ignorant of the fact, shortly after fired the fatal shot in pursuance of and in accordance with the purpose of the parties down to the time of the abandonment."

We do not think that the objection made by the defense to this part of the charge is well founded. Under such circumstances, Allen's so-called abandonment would be but an operation of the mind—a secret change of purpose. Doing nothing by word or deed to inform his co-conspirator of such change of purpose, the reasonable inference would be that he did not intend to inform him of it, and thus he would be intentionally encouraging and stimulating him to the commission of the homicide by his supposed co-operation with him. Such intent not to inform Hamlin of his change of purpose would, under the circumstances, be decisive of his guilt.

But the charge proceeds: "In other words, if during the fatal encounter with deadly weapons, in the state of things just described, Allen suddenly abandoned Hamlin, abandoned the enterprise, and went to his cell without saying a word to Hamlin to the effect that he had abandoned the enterprise, and Hamlin, supposing that he was still acting with him and that he had gone to his cell for an instrument to carry on the encounter, fired the fatal shot, his abandonment under such circumstances would be of no importance. A man cannot abandon another under such circumstances and escape the consequences of the aid he has rendered up to the time of the abandonment."

A majority of the court think that the jury may have been misled by this part of the charge, and that therefore, especially in view of the grave issues involved in this case, a new trial should be granted.

If Allen did in fact before the homicide withdraw from the con-

piracy, abandon the attempt to escape, and with the knowledge of Hamlin leave and go to his cell, Hamlin's misconstruction of his purpose in leaving did not necessarily make his conduct of no importance.

Until the fatal shot there was the "*locus penitentiae*." To avail himself of it Allen must indeed have informed Hamlin of his change of purpose, but such information might be by words or acts; and if, with the intention of notifying Hamlin of his withdrawal from the conspiracy, he did acts which should have been effectual for that purpose, but which did not produce upon the mind of Hamlin the effect which he intended and which they naturally should have produced, such acts were proper for the jury to consider in determining the relation of Allen to the crime which was afterwards committed.

Allen's act of leaving and going to his cell, if he did so, had some significance in connection with the question of intention and notice, and was therefore proper for the consideration of the jury. How much weight was to be given to it would depend upon circumstances, such as the situation of the parties and the opportunity for verbal or other notice.

The same observations are perhaps applicable to the charge of the court in answer to the sixth request for instructions. While it is clear that the request as made should not have been complied with, the charge that was given may be open to the implication that some notice of Allen's abandonment of the conspiracy must have been given by him to Hamlin beyond that afforded by his act of leaving.

The answers of the court to the other requests for instructions seem to us, in view of the claims of the counsel and the admitted facts in the case, to be correct and sufficiently explicit.

A new trial is advised.

GRANGER, SANFORD, and HOVEY, JJ., concurred. LOOMIS, J., dissented.

SECTION 3.—ACCESSORY BEFORE THE FACT.

Accessories, again, are of two kinds—accessories before the fact committed, and accessories after.

An accessory before is he that, being absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony, and it is an offense greater than the accessory after; and therefore in many cases clergy is taken away from accessories before, which yet is not taken away from accessories after, as in petit treason, murder, robbery, and willful burning by St. 4 & 5 P. M. c. 4. Hale, P. C. c. 55.

This kind of accessory after the fact is where a person, knowing the felony to be committed by another, receives, relieves, comforts, or assists the felon. This, as hath been said, holds place only in felonies, and in those felonies where, by the law, judgment of death ought regularly to ensue, and therefore there is no accessory in petit larceny, homicide per infortunium, or homicide se defendendo. 15 Edw. III, Coron. 116. Hale, P. C. c. 56.

REX v. KELLY.

(Court for Crown Cases Reserved, 1820. Russ. & R., 421.)

The prisoner was tried and convicted before Mr. Justice Bayley at the Summer Assizes for Carlisle, in the year 1820, of stealing two horses.

It appeared in evidence that the prisoner and one Whinroe went to steal the horses. Whinroe left the prisoner when they got within half a mile of the place where the horses were. Whinroe stole the horses, and brought them to the place where the prisoner was waiting for him, and then the prisoner and Whinroe rode away with them.

The learned judge thought the owner's possession was not destroyed by Whinroe's theft, and that the prisoner's joining in riding away with the horses might be considered as a new larceny; but, upon adverting to the case of *Rex v. King*, before the judges in Easter Term, 1817, he thought his first opinion wrong, and reserved the case for the consideration of the judges.

In Michaelmas Term, 1820, the judges met and considered this case. They held the conviction wrong, being of opinion that the prisoner was an accessory only, and not a principal, because he was not present at the original taking.

PARKE, J., in *REX v. COOPER*, 5 Car. & P., 535 (1833): With respect to an accessory before the fact, it is not necessary that there should be any direct communication between the accessory and the principal. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it will be sufficient, even though the accessory does not name the person to be procured, but merely directs the agent to employ some person.

Essentials:

1. The Felony must be committed
2. Accessory must be present
3. Accessory must procure another to commit the

REGINA v. TRACY.

(Queen's Bench, 1703. 6 Mod. 30.)

Tracy, a justice of the peace for Middlesex, was indicted, for that he, together with Taylor and Jeoffries, by pretense of a certain warrant in writing, supposed to be signed and sealed by Sir Simon Lovell, recorder of London, did arrest J. Muriel, and brought him before J. Chamberlain, a justice of the peace for Middlesex, although the warrant was not directed to any of them, and although it was forged and counterfeited to Tracy's knowledge; and that Tracy, when Muriel was before the justice of the peace, persuaded him to refuse to bail him, though the fault being a misdemeanor was in its nature bailable; and that when J. Muriel was committed by the justice, Tracy and the other two, at the persuasions and instance of Tracy, extorted divers sums of money from him.

The jury acquitted the defendant of the forgery, and of knowing that the warrant was forged, and found him guilty of all of the rest. Wells and Parker now moved in arrest of judgment.

Fifthly.¹ As to some part of the charge, they charge him as accessory, when, it being trespass, they are all principals, and it ought to be charged as such.

HOLT, Chief Justice. As to the fifth objection, that he is not in some things charged as a principal. It is to be known, that a fact which would make one accessory in felony, in treason, and in trespass, makes him a principal; and sure one may lay the matter either way, viz., making him principal or laying it special, as it will appear upon evidence. In treason all are principals; and if upon the statute of 25 Edw. III, c. 2, one conspires the death of the queen, and is committed to prison for the same, and one procures him to escape, or harbors him after such time as he knows him charged with treason, or to have committed treason, you may indict him upon the special matter, that A committed treason, that B knew of it and received him; and yet this is not one of the treasons mentioned by that statute, but it is so by necessary consequence of law. As if a thing be made a felony, all accessories before and after are felons in consequence; and if an offense which is felony be made treason, they that would have been accessories before shall now be principals.²

¹ Only so much of this case as relates to accessories is printed.

² Accord: Misdemeanor, *Commonwealth v. Gillespie*, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475 (1822); *Reg. v. Moland*, 2 Moo. 276 (1842); *Lowenstein v. People*, 54 Barb. (N. Y.) 299 (1863); *State v. Dewar*, 65 N. C. 572 (1871); *Wagner v. State*, 43 Neb. 1, 61 N. W. 85 (1894); *Bliss v. U. S.*, 105 Fed. 508, 44 C. C. A. 324 (1900); treason, *Throgmorton's Case*, 1 Dyer, 98b (1553). But see *U. S. v. Burr*, 4 Cranch (U. S.) 469 (1807).

SAUNDERS' CASE.

(Warwick Assizes, 1571. 2 Plow. 473.)

Reporter's Note.—It seems to me reasonable that he who advises or commands an unlawful thing to be done shall be adjudged accessory to all that follows from that same thing, but not from any other distinct thing. As if I command a man to rob such a one, and he attempts to rob him, and the other defends himself, and a combat ensues between them, and the person attempted to be robbed is killed, I shall be accessory to this murder, because when he attempted to rob him, he pursued my command, and then when he pursued my command, and in the execution thereof another thing happened, I ought in reason to be deemed a party therein, because my command was the cause of it. So if I command one to beat another, and he beats him so that he dies thereof, I shall be accessory to this murder, for it is a consequence of my command, which was the original foundation thereof, and which naturally tended to endanger the life of the other. So if I command one to burn the house of J. S. feloniously in the night, and he does so, and the fire thereof burns another house, I shall be accessory to the burning of the other house, so that altho' I am afterwards pardoned for being accessory to the burning of the house of J. S. yet shall I be hanged for the burning of the other house, for inasmuch as the burning of the second house followed from my command, and I am clearly accessory to the burning of the first house, I ought also in reason to be adjudged accessory to all that followed from the burning of the first house. But if I commanded him to burn the house of such a one, whom he well knows, and he burns the house of another, there I shall not be accessory to this, because it is another distinct thing to which I gave no assent nor command, but wholly different from my command. As if I command one to steal a horse, and he steals an ox, or if I command him to steal a white horse and he steals a yellow horse, this differs directly from my command, and my consent cannot be carried over to it, for there is not the least connection or affinity between this act and my command. And so if I command a person to rob such a goldsmith of his plate in such a place as he is going to Sturbridgefair, and he breaks open his house in Cheapside, and he steals his plate from thence, I shall not be accessory to this burglary, because it is a felony of another kind from that which I commanded. But if I command one to kill another by poison, and he kills him with a sword, or if I command one to kill another in the fields and he kills him in the city or church, or I command him to kill him such a day, and he kills him another day, there I shall be accessory to the murder, because the death is the principal matter, which has followed from my command, and the place, instrument, time, and the like, are but the manner and form how the death of the party shall be effected, and not the substance of

the matter, and a variance in the formal part of the execution of the command shall not discharge a man from being accessory. But yet in some cases the time may be material; for if I command one to kill J. S. and before the fact done I go to him and tell him that I have repented, and expressly charge him not to kill J. S. and he afterwards kill him, there I shall not be accessory to this murder, because I have countermanded my first command, which in all reason shall discharge me, for the malicious mind of the accessory ought to continue to do ill until the time of the act done, or else he shall not be charged; but if he had killed J. S. before the time of my discharge or countermand given, I should have been accessory to the death, notwithstanding my private repentance.

BIBITHE'S CASE.

(King's Bench, 1596. 4 Coke, 43.)

John Goff, brother and heir of R. Goff, brought an appeal of murder of the said R. G., against Bibithe as principal, and against Hoell David as accessory before, and against David ap. Thomas as accessory after; the principal pleaded not guilty, and by nisi prius in the county of Monmouth he was found guilty of manslaughter, and not guilty of murder, and had his clergy: and upon this matter first it was resolved by Popham, C. J., *et per tot' cur'*, in B. R., that Hoell David was discharged, because he could not be accessory before the fact in case of manslaughter, for manslaughter ought to ensue upon a sudden debate or affray, for if it is premeditated it is murder.¹ 2. It was resolved, that although the principal was convicted by verdict, yet forasmuch as he had his clergy before judgment, so that it does not appear judicially, *sc.* by judgment of the law that he was a principal, therefore, and for the causes alleged in Syer's Case, it was awarded, that both the accessories, as well before as after, should be discharged. The same law, if the principal upon arraignment confesses the felony, and before judgment obtains a pardon, or has his clergy allowed, the accessory thereby is discharged, *vide* 2 E. 3, 27, 22 E. 3. Corone 264, 7 H. 4, 16. 10 H. 4, 5. 3 H. 7, 1. B. & 3 H. 7. Corone 53. And upon divers disagreeing opinions, you will understand the law, as here it was adjudged upon consideration of all the books.²

¹Accord: *Bowman v. State* (Tex. Cr. App.) 20 S. W. 558 (1892). Compare *Reg. v. Gaylor*, 1 Dears. & B. 288 (1857).

²The distinction between principals and accessories before the fact has been abolished by statute in some states. Under these statutes it is generally held that an accessory may be indicted as a principal. See *Campbell v. Commonwealth*, 84 Pa. 187 (1877); *Baxter v. People*, 2 Gilman (Ill.) 578 (1845); *People v. Davidson*, 5 Cal. 134 (1855); *State v. Berger*, 121 Iowa, 581, 96 N. W. 1094 (1903).

SECTION 4.—ACCESSORY AFTER THE FACT.

ROBERT'S CASE. *Correct Dec 16 08 1911*

(Queen's Bench, 1569. 3 Co. Inst. 138.)

CATLIN and BROWNE, Justices of Assize in the county of Suffolk, put this case to all the judges. A man committed felony in the county of Suffolk, for which he was committed to the gaol. and R., an attorney, advised the friends of the felon to persuade the witnesses not to appear to give evidence against him, which was done accordingly; and it was resolved that neither the friends nor the attorney were accessories to the felony, but that it was a great contempt and misprision, for which they might be fined and imprisoned.¹

STATE v. DAVIS.

(Supreme Court of Rhode Island, 1883. 14 R. I. 281.)

Exceptions to the court of common pleas. Providence.

DURFEE, C. J. This is an indictment for the violation of Pub. St. R. I. 1882, c. 247, § 3, which reads as follows, to wit: "Every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to another who shall have committed any offense or been accessory before the fact to the commission of any offense, who shall be convicted of knowingly harboring or relieving such other person, with intent that he shall escape or avoid detection, arrest, trial, or punishment, shall be imprisoned not exceeding five years or be fined not exceeding one thousand dollars." In the indictment, found in the court of common pleas, the offense was charged in manner following, to wit: That at Newport, on the 15th day of March, 1883, the defendants "did then and there knowingly harbor and relieve another, to wit, one George H. Rounds, with the intent that he the said Rounds should then and there avoid detection, arrest, trial, and punishment, he, the said George H. Rounds, having then and there committed an offense, to wit, the offense of entering a dwelling house in the daytime, with intent to commit larceny therein; the said Thomas T. Davis, and the said George T. Davis and the said Patrick White not then and there standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity

¹Compounding a crime does not make the one compounding an accessory after the fact. *Chenault v. State*, 46 Tex. Cr. R. 351, 81 S. W. 971 (1904), overruling *Gatlin v. State*, 40 Tex. Cr. R. 116, 49 S. W. 87 (1899).

People v. State. 112/48. Judge Jones. May 1/2 1890. The 112/48 was suppressed then, knowing this later on after it was found to be principal. For whenever property is taken by means of a conspiracy, it is a crime, even if it is not a crime.

or affinity to the said George H. Rounds." The defendants moved the court below to quash the indictment for insufficiency, and the court overruled the motion. The defendant excepted, and now, after verdict of guilty against George T. Davis, he brings the cause to this court for revision.

The defendant contends that the indictment is defective, in that it does not allege that the defendants harbored and relieved Rounds, knowing that he had committed the crime which he is alleged to have committed; such knowledge being a necessary ingredient of the offense under the statute. If the knowledge be a necessary ingredient, we think the knowledge should have been alleged with certainty, and that the indictment is bad for want of the allegation.

The Attorney General contends that the knowledge is not necessary, because if it be necessary, a person may harbor or relieve another with impunity, so long as he is ignorant of the particular offense which the other has committed, though he knows perfectly well that he has committed an offense and is fleeing from arrest, and though his purpose in harboring or relieving him is to aid his escape. If the knowledge be necessary, argues the Attorney General, he may safely harbor and hide a convict fleeing from prison in his prison garb, with the officers of the law in hot pursuit, if only he be ignorant of the particular offense which the fugitive has committed. The argument against the construction contended for by the defendant is certainly very cogent. But, on the other hand, if the statute is not to be so construed, the word "knowingly" in the statute is superfluous, having no meaning which is not necessarily implied without it. Moreover, if the statute is not to be so construed, a person who harbors another, knowing that he has committed some petty misdemeanor, and simply intending to help him escape arrest for it, may be convicted under an indictment in which the principal offense alleged is murder or some other heinous crime, knowing of which he would have recoiled from harboring the criminal.

These are views which strike the mind on simply reading the statute, without reference to its history or antecedents. We think, however, that the statute cannot be fairly construed without reverting to the common-law offense which was superseded by it, and tracing the statute to its present form. Evidently the statutory offense was intended to take the place of the common-law offense of being an accessory after the fact. At common law an accessory after the fact is one who, knowing a felony has been committed by another, receives, relieves, comforts, or assists the felon. "To constitute an accessory after the fact," it is said, "three things are requisite: The felony must be completed; he must know that the felon is guilty; and he must receive, relieve, comfort, or assist him." 1 Archbold, *Crim. Prac. & Plead.* (8th Ed.) 17, note 2. These being requisites of the offense, it was, of course, necessary to allege them in the indictment; and so are the forms or precedents. *Id.* 75, 76. By the old

common law the principal and the accessory were liable to the same punishment, and no man could be tried as accessory after the fact till after the principal felon was convicted. We do not find any statute of the state changing this common law until A. D. 1798. Section 20 of "an act to reform the penal laws," contained in the Digest of 1798 (Pub. Laws, p. 591), provides "that every person who shall knowingly receive, harbor, conceal, maintain, assist, or relieve any person or persons who have committed any of the crimes aforesaid, or hereafter mentioned, although the principal offender cannot be taken so as to be prosecuted, is and shall be considered an accessory after the fact, and shall be fined not exceeding five hundred dollars, and be imprisoned not exceeding two years." The section seems to have been intended to change the common law in three particulars, namely: First, to make it extend to the harboring of others besides felons; second, to mitigate or limit the punishment; and, third, to make the accessory liable to trial and punishment, "although the principal offender cannot be taken so as to be prosecuted." We see no reason to think that any other change was contemplated. The offender is denominated an "accessory after the fact." The offense, therefore, subject to the alterations effected by the statute, ought to be deemed to have the character of the common-law offense. If so, then knowledge on the part of the accessory, not only that the principal offense had been committed, but also that the person harbored had committed it, was a necessary ingredient in the accessory offense. We think there can be no doubt that the word "knowingly," as used in the section, was intended to have that meaning. The section was re-enacted without change in the Digest of 1822. In the Digest of 1844 the section was altered, and it appeared there, as it has appeared in all later revisions, in its present form. The section in its present form increases the punishment, but in another respect it mitigates the severity of the law. Previously any person, except a wife, however closely related to the criminal, exposed himself to punishment as an accessory after the fact by knowingly harboring him. The section in its present form exempts from its operation the husband or wife of the principal offender and certain others nearly related to him. It also expresses, what was probably before implied, that the guilt is incurred only when there is an intent to shield the principal offender from the law. These are the only alterations worthy of note which are apparent. Now the question is whether, by reason of these alterations, the word "knowingly" has acquired a different meaning from what it previously had. It seems to us that we must assume that the old word has the old meaning until it is clearly apparent that it was meant to have another. We do not find any sufficient indication that a different meaning was intended. The Legislature has been very explicit in the changes above noted, and we cannot suppose, if so essential a change in the character of the offense as that which the Attorney General contends for had been in-

tended, that the Legislature would have left it so completely to inference or conjecture. We think, therefore, that the indictment is bad, in that it does not allege with the certainty required by the rules of criminal pleading the offense which, as we construe the statute, was intended to be punished by it.

Exceptions sustained, and indictment quashed.¹

REGINA v. BUTTERFIELD.

(Yorkshire Assizes, 1843. 1 Cox, C. C. 39.)

The prisoner was indicted as an accessory after the fact. The indictment stated that at a general sessions of Oyer and Terminer, etc., holden, etc., on the 12th July, in the seventh year, etc., before, etc., it was presented that Thomas Butterfield, then late of, etc., and Patrick Burke, then late of, etc. (it then sets out the former indictment against Burke and Butterfield, for a robbery of a £100 note), upon which said indictment the said T. Butterfield was, at the general sessions, etc., aforesaid, found not guilty, etc., and the said Patrick Burke was duly convicted and found guilty of the felony and robbery aforesaid, as by the said record thereof more fully and at large appears. And the jurors aforesaid, etc., that the said Thomas Butterfield, well knowing the said Patrick Burke to have done and committed the robbery aforesaid, after the same was committed, to wit, on, etc., at, etc., him, the said Patrick Burke, did feloniously receive, harbor, maintain, relieve, aid, comfort, and assist, contrary to the form of the statute, etc., and against the peace, etc.

The prisoner had been indicted, together with Burke, for a robbery of the note from a person of the name of Turner; and it appeared that, shortly after the robbery was committed, Butterfield applied to his landlady to change the note, but did not succeed, and that Burke then went to a shop to purchase some articles, for the payment of which he tendered the note, and received a large part of it in change, and that during the time he was in the shop Butterfield was waiting outside.²

Bliss then submitted that the evidence did not support the indictment. The prisoner is not charged with being an accessory after the fact under the statute which makes receiving stolen goods a felony, but at common law. He is charged with feloniously "receiving, harboring, maintaining, relieving, aiding, comforting, and assisting Burke"; but that is not at all maintained by showing anything done with the stolen property. Harboring, etc., means doing

¹ In *State v. Miller*, 182 Mo. 370, 81 S. W. 867 (1904), it was held under a similar statute that the burden of proving that the defendant is within the class of excepted persons is on him.

² Part of this case relating to another point is omitted.

something to enable the prisoner to escape. If it had meant assisting him in making away with the stolen property, the statute would have been useless; for at common law, to make a man an accessory after the fact, he must have given the felon some personal assistance. "An accessory after the fact is one who knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon." 1 Hale, 618; Archbold's Crim. Law (7th Ed.) 8. "With regard to the acts which will render a man guilty as an accessory after the fact, it is laid down that generally any assistance whatever given to a person known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose, as where a person assists him with a horse to ride away with, or with money or victuals to support him in his escape, or where any one harbors and conceals in his house a felon under pursuit, in consequence of which his pursuers cannot find him; much more, where the party harbors a felon, and the pursuers dare not take him." Hawk. P. C. p. 2, c. 29, § 26; Roscoe on Cr. Ev. 208.

Wilkins and Pickering, contra. Quite enough has been proved to leave this case for a jury to decide. There can be no doubt that Butterfield was outside the shop with the intention of aiding and assisting Burke in getting rid of the note, and was there with the intention of aiding him in his escape, and he consequently comes within Lord Hale's definition. It is for the jury to say whether he did know that a felony had been committed, and was there to aid and assist. The statute has made no difference. In one sense, enabling the felon to get rid of the stolen property is a mode of preventing his being apprehended and tried, and is a kind of personal assistance; but the true definition is, "any means by which a party, knowing a felony to have been committed, enables the felon to obtain the fruits of that felony." If so, we come within that definition.

Bliss, in reply. My complaint is that we are charged with receiving and harboring the felon, but the proof is of receiving the goods. That cannot come within the words "comfort and assistance." There is no evidence of any personal act of receiving, comforting, or assisting him, nor any evidence which, at common law, would constitute the prisoner an accessory after the fact.

MAULE, J. I think there is evidence of comforting and assisting which would make the prisoner an accessory after the fact. If a man stole a horse, and another assisted him in coloring and disguising him, so that he could not be known again, that would make him an accessory. Here the prisoner assists the party who has stolen the goods to get rid of them, and thus evade the justice of the country.

MAULE, J. (to the jury). The question is whether the prisoner gave assistance, comfort, and aid to Burke, knowing he had committed this robbery? The evidence is that they were found in Gally's shop, very earnest to get change, and before that, on the

same day, Butterfield had applied to the landlady for change. Now, supposing that Butterfield had known this was a robbery, and was assisting Burke in getting money, and thus suppressing the important evidence of the possession of the note, I think that there was assistance within the meaning of the statute. If you are convinced that the prisoner knew that this money was a part of the proceeds of the robbery, and that he went with Burke to enable him to effect his object in getting rid of the money, then you must find him guilty. If he did not know that Burke was guilty of this robbery, or that this bank note was part of it, you ought to acquit him.

The prisoner was found guilty.²

SECTION 5.—PRINCIPAL AND AGENT.

COMMONWEALTH v. STEVENS.

(Supreme Judicial Court of Massachusetts, 1892. 155 Mass. 291, 29 N. E. 508.)

KNOWLTON, J.³ The only other exceptions argued relate to the refusal of the court to give the defendant's third request for instructions to the jury, and to the instructions given. The instructions given were as follows: "If you are satisfied beyond a reasonable doubt that the defendant stood by and saw this sale to the minor, and assented to it, he is liable for the sale. If the defendant used proper care in the selection of his clerks, and used proper precautions by instructions to and supervision of his clerks, he was not bound to personally scrutinize the person of every customer who applied for liquor. If he does see the customers, and any of them are minors, and he stands by, knowing that a sale is made by a clerk to a minor, and he does not prevent it, he is liable. The defendant is not liable if the sale by the clerk was an honest mistake on the part of the clerk as to the age of the person to whom he sold, provided the jury are satisfied that the master sincerely and honestly intended that his instructions should be obeyed in good faith, and that he was not negligent or careless in the selection of his clerks, or in the regulations and precautions which he prescribed for their guidance. The evidence as to the other sales made, and the business carried on at the store, is only competent upon the question of the reasonableness

² Compare *Blakely v. State*, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912 (1888); *State v. Jett*, 69 Kan. 788, 77 Pac. 546 (1904).

"The facts proved are (if believed) sufficient to make the prisoner, Stear, liable as an accessory. If he employed another person to receive, relieve, comfort, and assist the principal felons, he did it himself." *Gurney, B., in Rex v. Jarvis*, 2 Moo. & R. 40 (1837).

³ Part of this case, relating to a question of evidence, is omitted.

of the precautions taken by the defendant to prevent sales to minors, and whether the method of determining the age of a customer was a reasonable one, or whether it indicated bad faith or negligence on the part of the defendant in the mode of conducting his business." The request was as follows: "If the sale and attendant circumstances found by the jury are consistent with the theory that defendant really intended that no sale should be made to minors, but was merely negligent, then the jury must acquit." The question before the jury was, not whether the defendant intended that no sale should be made to minors, but whether the sale which was made was his act. If he made the sale, and intended to make it, it would be no defense that he was mistaken in supposing that the buyer was not a minor. It is to be remembered that the statute forbidding the unlicensed sale of intoxicating liquor, like the laws regulating the sale of milk, and many other similar statutes, punishes the unlawful act, and on grounds of public policy holds the defendant responsible for knowledge of the nature of his act; so that it is possible in a supposable case for one to be guilty of a technical violation of the law without culpability, and to find it necessary for his protection to appeal to the sense of justice of those who are intrusted with the administration of the law. *Commonwealth v. Uhrig*, 138 Mass. 492. If the sale was made by his clerk, and if it was authorized by him by special authority in the particular case, or by a general authority which included it, it would be no defense to show that he did not intend to make sales to minors, but was negligent in not taking measures to prevent them. Through a long line of cases the test of the master's liability for an act of this kind done by his servant has been whether it was done by his authority. *Commonwealth v. Putnam*, 4 Gray, 16; *Commonwealth v. Wachendorf*, 141 Mass. 270, 4 N. E. 817; *Commonwealth v. Briant*, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707; *Commonwealth v. Stevenson*, 142 Mass. 466, 8 N. E. 341; *Commonwealth v. Hayes*, 145 Mass. 289, 14 N. E. 151; *Commonwealth v. Rooks*, 150 Mass. 59, 22 N. E. 436.

The criminal liability of a master for the act of his servants does not extend so far as his civil liability, inasmuch as he cannot be held criminally for what the servant does contrary to his orders, and without any authority, express or implied, merely because it is in the course of his business and within the scope of the servant's employment; but he would be liable civilly for a tort of this kind. *Roberge v. Burnham*, 124 Mass. 277; *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376. But if the act is the master's, because done by the servant within his authority, and especially if it is an act which is made punishable even when done in ignorance of its punishable quality, the statute applies to the master as well as to the servant.

The defendant was not aggrieved by the instructions given. In one part of the case the jury were told that the proof must be beyond a reasonable doubt, and if the defendant had desired that

their attention should be further directed to the degree of proof upon other points he should have asked for an instruction in regard to it.

A part of the charge was directed to evidence that the defendant stood by and saw the sale made, and there was no error in it. The instructions which are chiefly criticised by the defendant's counsel followed closely the language of the opinion of this court at the former hearing of this case, reported in 153 Mass. 421, 26 N. E. 992, and the rights of the defendant were fully protected by them.

Exceptions overruled.²

² See, also, for doctrine that the principal is not responsible for the acts of the agent unless done with his consent or acquiescence. *State v. Smith*, 10 R. I. 258 (1872); *Anderson v. State*, 22 Ohio St. 305 (1872); *Reg. v. Holbrook*, 4 Q. B. Div. 42 (1878); *State v. Baker*, 71 Mo. 475 (1880); *People v. Parks*, 49 Mich. 333, 13 N. W. 618 (1882); *Commonwealth v. Johnston*, 2 Pa. Super. Ct. 317 (1896); *Rosenbaum v. State*, 24 Ind. App. 510, 57 N. E. 156 (1900).

Contra, under particular statutes: *McGuire v. State*, 37 Miss. 369 (1859); *Noecker v. People*, 91 Ill. 494 (1879); *Warren v. State*, 38 Ark. 641 (1882); *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270 (1884); *Loeb v. State*, 75 Ga. 258 (1885).

That the agent is also liable, see *State v. Bugbee*, 22 Vt. 32 (1849); *Smith v. Dist.*, 12 App. D. C. 33 (1887); *Witherspoon v. State*, 39 Tex. Cr. R. 65, 44 S. W. 164, 1096 (1898); *People v. Dunlap*, 32 Misc. Rep. 390, 66 N. Y. Supp. 161 (1900).

CHAPTER VIII.

ASSAULT, BATTERY, AND MAYHEM.

It seems that an assault is an attempt, or offer, with force and violence, to do a corporal hurt to another, as by striking at him with or without a weapon, or presenting a gun at him at such a distance to which the gun will carry, or pointing a pitchfork at him, standing within the reach of it, or by holding up one's fist at him, or by any other such like act done in an angry, threatening manner; and from hence it clearly follows that one charged with assault and battery may be found guilty of the former and yet acquitted of the latter. But every battery includes an assault. Therefore on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day that no words whatever can amount to an assault. It seems that any injury whatsoever, be it never so small, being actually done to the person of a man in angry, revengeful, rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law. But it is said to be no battery to lay one's hand gently on another whom an officer has a warrant to arrest, and tell the officer that this is the man he wants.—1 Hawkins, P. C. 110.

TUBERVILLE v. SAVAGE.

(King's Bench, 1669. 1 Mod. 3.)

Action of assault, battery and wounding. The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was, If that were an assault? THE COURT agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the judges being in town; and the intention as well as the act makes an assault. Therefore, if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.¹

¹ Accord: Commonwealth v. Eyre, 1 Serg. & R. (Pa.) 347 (1815).

UNITED STATES v. MYERS.

(Circuit Court of the United States, District of Columbia, 1806. 1 Cranch, C. C. 310, Fed. Cas. No. 15,845.)

Presentment for an assault on Jane McGrath. The evidence was that the defendant doubled his fist and ran it towards the witness, saying, "If you say so again I will knock you down."

Mr. Key, for the defendant, contended that it was not an assault. The words explain the act, and show the intention not to be to commit a battery. It was like the case of a man putting his hand on his sword, and saying, "If it were not term time or assizes, I would kill you," etc., and he moved the court to instruct the jury that it was no assault.

Mr. Jones, attorney for the United States, contra.

THE COURT (nem. con.) refusing to give the instruction.

Verdict—guilty. Fined five dollars.¹

REGINA v. MARCH.

(Worcester Assizes, 1844. 1 Car. & K. 496.)

It appeared that the defendant, March, resided in High street, Bordesley, near Birmingham, and dispensed medicines, and also practiced as a surgeon, the other defendant living with him, and that Anne Milne, who came to the defendant March's house for her accouchment, was on Saturday, the 18th of May, 1844, delivered of a male child, which the defendants told her was to be taken to a nursery or institution to be brought up. It further appeared that at about 2 o'clock in the afternoon on Monday, the 20th of May, 1844, the defendants left their home with the child, and were seen by a witness named Dingley, at between 2 and 3 o'clock on the same afternoon, passing along a footpath leading from the Alcester turnpike road, by the side of Moseley Park, to Edgbaston Lane, and that, soon after that, this witness saw hung from the paling at the side of the footpath a coarse linen bag, about 2 feet deep and 15 inches wide, which hung upon one of the pales by two holes made in the upper part of the bag. This bag contained a child and some pieces of old cloth, which had formed part of a coat. It was proved by a superintendent of police, named Griffiths, that he took the defendant March into custody on the same afternoon, when the defendant March stated that he gave the child to a woman named Vincent, who lived in Red Lion yard and was a midwife, and that she was to take it to be dry-nursed to some hospital; but the superintendent of police stated that no such

¹ Accord: *Keefe v. State*, 19 Ark. 190 (1857); *State v. Horne*, 92 N. C. 805, 53 Am. Rep. 442 (1885).

person could be found. Evidence was also given to show, that the bag in which the child was belonged to the defendant March, and that pieces of cloth corresponding with those found with the child were found in his house. It was further proved by Mr. Kimberly, a surgeon, that in his opinion the putting a child of so tender age into a bag, and then hanging the bag on pales, would be likely to cause the death of the child.

Huddleston, for the defendants. With respect to the third and fourth counts,¹ I submit that, if there was consent to what was done, there could be no assault. As the child was of so tender age, the consent of its mother might be necessary; but here the defendants had possession of the child by the consent of the mother.

TINDAL, C. J. The mother gave that consent on the false pretext that the child was to be taken to some institution; and, as that pretext was false, it was really no consent.

Keating, for the prosecution. I do not understand your lordship to decide that, if the mother had consented to all that was done, there would have been no assault on the child.

TINDAL, C. J. I have not said that. All that I have said is that there is no evidence of any consent on the part of the mother.

Huddleston addressed the jury for the defendants, and argued that there was no sufficient proof of any intention to murder, so as to support the first and second counts.

TINDAL, C. J. (in summing up). The defendants are charged with having assaulted this child, and in the first and second counts an intent to murder is laid. I much incline to think that an intent to murder cannot be fairly inferred here; for, if there had been an intention in the prisoners to have murdered this child, a very little difference in the mode of packing up the bag would have carried that intention into effect. With respect to the third and fourth counts, there is no real difference in the charges contained in them, and the taking of the child and putting it into a bag was an assault. The case, therefore, resolves itself into this question: Whether the defendants are the persons who did take this child, and put it into the bag, and hang it on the palings; but I think you may acquit them on all those counts which charge an intent to murder.

The jury found both the defendants guilty on the third and fourth counts of the indictment, and not guilty of the residue of the charge.²

¹ The indictment is omitted. The first count was for attempt to murder; the third and fourth, for assault.

² Compare *Reg. v. Mulroy*, 3 Crawford & Dix, 318 (1845); *Reg. v. Renshaw*, 2 Cox, C. C. 285 (1847).

STATE v. DANIEL.

(Supreme Court of North Carolina, 1904. 136 N. C. 571, 48 S. E. 544, 103 Am. St. Rep. 970.)

WALKER, J.¹ The first instruction was that if the defendant cursed the prosecutor, Alston, and ordered him to come to him, and Alston obeyed through fear, the defendant was guilty of an assault. Before the prosecutor reached the place near the hog pen where the defendant was standing, the latter had made no threat, nor had he offered or attempted any violence to the person of the prosecutor, nor was there any display or exhibition of force of any kind, so far as the evidence here shows. In this state of the case we are unable to sustain this instruction as a correct statement of the law of assault. "It would seem," says Reade, J., "that there ought to be no difficulty in determining whether any given state of facts amounts to an assault; but the behavior of men towards each other varies by such mere shades that it is sometimes very difficult to characterize properly their acts and words." *State v. Hampton*, 63 N. C. 14. While the law relating to this crime would seem to be simple and of easy application, we are often perplexed in our attempt to discriminate between what is and what is not an assault. But in this case we have no such difficulty, as the law applicable to the facts has been clearly stated and well settled by the decisions of this court.

An assault is an intentional offer or attempt by violence to do any injury to the person of another. There must be an offer or attempt. Mere words, however insulting or abusive, will not constitute an assault; nor will a mere threat or violence menaced, as distinguished from violence begun to be executed. Where an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, and there has been a sufficient offer or attempt. *State v. Davis*, 23 N. C. 125, 35 Am. Dec. 735; *State v. Reavis*, 113 N. C. 677, 18 S. E. 388. This principle, as stated by Judge Gaston in the first case cited, has been adopted as a correct exposition of the law of assault, not only in subsequent decisions of this court, but in numerous cases decided in the courts of the other states. There must, therefore, be not only threatening words or violence menaced, but the defendant must have committed some act in execution of his purpose. It is not necessary at all that his words should be accompanied or followed by an actual battery, for a mere assault excludes the idea of a battery; but he must either offer to do violence, as by drawing back his fist or raising a stick, or attempt to do it, as by aiming a blow at another, which does not take effect because it is warded off by a third person, or by shooting at another and missing the mark, all of which is clearly and fully explained by Pearson, C. J., in *State*

¹ Part of this case is omitted.

v. Myerfield, 61 N. C. 108. It is not necessary, in view of the facts of this case, that we should stop here to state how these acts can be qualified by words or otherwise, and with what restrictions or exceptions, so as to relieve the accused of any guilt. The law in this respect is also discussed in Myerfield's Case, *supra*.

The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be. *State v. Hampton*, 63 N. C. 13; *State v. Church*, 63 N. C. 15; *State v. Rawles*, 65 N. C. 334; *State v. Shipman*, 81 N. C. 513; *State v. Martin*, 85 N. C. 508, 39 Am. Rep. 711; *State v. Jeffreys*, 117 N. C. 743, 23 S. E. 175. It is not always necessary, to constitute an assault, that the person whose conduct is in question should have the present capacity to inflict injury; for if by threats or a menace of violence which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger, and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose or pursuit, he commits an assault. It is the apparently imminent danger that is threatened, rather than the present ability to inflict injury, which distinguishes violence menaced from an assault. *State v. Jeffries and State v. Martin*, *supra*. It is sufficient if the aggressor, by his conduct, lead another to suppose that he will do that which he apparently attempts to do. 1 Archb. Cr. Pr., Pl. & Ev. (8th Ed. by Pomeroy) 907, 908.

If, therefore, the defendant had threatened the prosecutor with violence and the threat had been accompanied by any show of force, such as drawing a sword or knife, or if he had advanced towards the prosecutor in a menacing attitude, even without any weapon, and had been stopped before he delivered a blow, and the prosecutor had been put in fear and compelled to leave the place where he had the lawful right to be, the assault would have been complete, although he was not at the time in striking distance. But in this case, so far as the facts recited in the first instruction should be considered, there was not even violence menaced, but, at most, only offensive and profane words. There must be an overt act, or an attempt, or the unequivocal appearance of an attempt, with force and violence to do a corporal injury—such an act as will convey to the mind of the other person a well-grounded apprehension of personal injury. Bare words will never do; for, however violent they may be, they cannot take the place of that force which is necessary to complete the offense. They are often the exhibition of harmless passion, and do not by themselves constitute a breach of the peace, as the law supposes that against mere rudeness of language ordinary firmness will be a sufficient protection. *State v. Covington*, 70 N. C. 71.

It may be, as suggested, that the positions of the two parties were relatively unequal, as the defendant belonged to a strong and dominant and the prosecutor to a weak and servile race, and it may further be that the words of the prosecutor as he approached the defendant were the cringing utterances of servility and showed great humility and submissiveness, because of the lowliness of his station in life as compared with that of the defendant, and therefore he abjectly obeyed the latter's command to come to him. All this may be true; and while it reflects little credit upon the defendant, whose conduct as it now appears to us cannot be too severely condemned, it cannot have the effect of reversing a long-established principle of the law to which we must adhere; it being founded upon reason and justice and treated by the courts and the text-writers as one of universal application. The case of *State v. Milsaps*, 82 N. C. 549, illustrates the extent to which the principle has been carried. In that case it appeared that the defendant addressed grossly insulting language to the prosecutor, and then picked up a stone about 12 feet from the prosecutor, but did not offer to throw it; and the court held that it was not an assault, but only violence menaced, and it was therefore error for the lower court to charge the jury that if the acts and words of the defendant were such as to put a man of ordinary firmness in fear of immediate danger, and the defendant had the ability at the time to inflict an injury, he would be guilty. Substantially to the same effect is *State v. Mooney*, 61 N. C. 434. See, also, *Johnson v. State*, 43 Tex. 576. In neither of those cases, though, was the prosecutor deterred from doing what he had a right to do, or in any respect unlawfully restrained in his action or conduct or constrained to act contrary to his wishes.

New trial.

CHAPMAN v. STATE.

(Supreme Court of Alabama, 1884. 78 Ala. 463, 56 Am. Rep. 42.)

SOMERVILLE, J. The defendant was indicted for an assault and battery upon the person of one McLeod, and was convicted of a mere assault.

It may be that, if the indictment had been for robbery, the facts in evidence would have sustained the allegation of an assault, which, in cases of that nature, is often merely constructive; for every attempt at robbery, or to commit rape, or to do other like personal injury, involves within it the idea of an assault, either actual or constructive.

The present conviction, however, can be sustained only on the theory that it was an assault for the defendant to present or aim an unloaded gun at the person charged to be assaulted, in such a menacing manner as to terrify him, and within such distance as to have been dangerous, had the weapon been loaded and discharged. On this question the adjudged cases, both in this country and in England, are not agreed,

and a like difference of opinion prevails among the most learned commentators on the law. We have had occasion to examine these authorities with some care on more occasions than the present; and we are of the opinion that the better view is that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authorities on the subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's "right to live in society without being put in fear of personal harm," and can often be sustained by proof of a negligent act resulting in unintentional injury. *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81; *Cooley on Torts*, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence. *State v. Davis*, 23 N. C. 125, 35 Am. Dec. 735. The approved definition of an assault involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect; 2 Greenl. Ev. § 82; *Roscoe's Cr. Ev.* (7th Ed.) 296; *People v. Lilley*, 43 Mich. 521, 5 N. W. 982. Most of our decisions recognize the old view of the text-books that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another; 1 Russ. Cr. (9th Ed.) 1019; *State v. Blackwell*, 9 Ala. 79; *Tarver v. State*, 43 Ala. 354. In *Lawson v. State*, 30 Ala. 14, it was said that, "to constitute an assault, there must be the commencement of an act which, if not prevented, would produce a battery." The case of *Balkum v. State*, 40 Ala. 671, which was decided by a divided court, probably does not harmonize with the foregoing decisions.

It is true that some of the modern text-writers define an assault as an apparent attempt by violence to do corporal hurt to another, thus ignoring entirely all question of any criminal intent on the part of the perpetrator. 1 Whart. Cr. Ev. § 603; 2 Bish. Cr. Law, § 32. The true test cannot be the mere tendency of an act to produce a breach of the peace; for opprobrious language has this tendency, and no words, however violent or abusive, can at common law constitute an assault. It is unquestionably true that an apparent attempt to do corporal injury to another may often justify the latter in promptly resorting to measures of self-defense. But this is not because such apparent attempt is itself a breach of the peace, for it may be an act entirely innocent. It is rather because the person who supposes himself to be assaulted has a right to act upon appearances, where they create reasonable grounds from which to apprehend imminent peril. There can be no difference, in reason, between presenting an unloaded gun at an antagonist in an affray and presenting a walking cane as if to shoot, provided he honestly believes, and from the circumstances has reasonable ground to believe, that the cane was a

loaded gun. Each act is a mere menace, the one equally with the other; and mere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages. The test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or creating alarm in the mind; for one may obviously be assaulted, although in complete ignorance of the fact, and, therefore, entirely free from alarm. *People v. Lilley*, 43 Mich. 525, 5 N. W. 982, 1 Crim. Law. Mag. 605. And one may be put in fear under pretense of begging, as in *Taplin's Case*, occurring during the riots in London, decided in 1780, and reported in 2 East, P. C. 712, and cited in many of the other old authorities. These views are sustained by the spirit of our own adjudged cases, cited above, as well as by the following authorities, which are directly in point: 2 Greenl. Cr. Law Rep. pp. 271-275, and note, where all the cases are fully reviewed; 2 Addison on Torts (Wood's Ed. 1881) pp. 4-7, § 788, note 1; Roscoe's Crim. Ev. (7th Ed.) 296; 1 Russell Cr. (9th Ed.) 1020; *Blake v. Barnard*, 9 C. & P. 626; *Reg. v. James*, 1 C. & P. 530; *Robinson v. State*, 31 Tex. 170; *McKay v. State*, 44 Tex. 43; *State v. Davis*, 23 N. C. 125, 35 Am. Dec. 735.

The opposite view is sustained by the following authors and adjudged cases: 7 Bish. Cr. Law (7th Ed.) § 32; 1 Whart. Cr. Law (9th Ed.) §§ 603, 182; *Reg. v. St. George*, 9 C. & P. 483; *Commonwealth v. White*, 110 Mass. 407; *State v. Shepard*, 10 Iowa, 126; *State v. Smith*, 2 Humph. (Tenn.) 457. See, also, 3 Greenl. Ev. (14th Ed.) § 59, note "b"; 1 Arch. Cr. Pr. & Pl. (Pomeroy's Ed.) 907, 282-283; *State v. Benedict*, 11 Vt. 238, 34 Am. Dec. 688; *State v. Neely*, 74 N. C. 425, 21 Am. Rep. 496.

The rulings of the court were opposed to these views; and the judgment must therefore be reversed, and the cause remanded.¹

¹ Accord: *People v. Sylva*, 143 Cal. 62 (1904); *Klein v. State*, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354 (1893); *State v. Sears*, 86 Mo. 169 (1885); *State v. Godfrey*, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830 (1889); *McConnell v. State*, 25 Tex. App. 329, 8 S. W. 275 (1888).

Contra, in addition to cases cited in opinion: *People v. Morehouse*, 53 Hun. 638, 6 N. Y. Supp. 763 (1889); *State v. Archer*, 8 Kan. App. 737, 54 Pac. 927 (1898).

"As shown above, the state's case as to the assault depends on the testimony of the prosecutrix, Rosa Singleton, wherein she states that appellant asked her to kiss him, and on her refusal he reached his hands out as if to grab her, and she jumped out of the door. This may constitute an assault, under the authorities: that is, appellant evidently had the ability of committing a battery on prosecutrix, and if, without her consent, he attempted, by the use of force, to make her kiss him, and she fled to prevent this, then there would be an assault. If, on the other hand, appellant reasonably believed, under the circumstances, that prosecutrix would allow him to kiss her, and that he merely attempted to kiss her by consent, and did not intend to use force to compel her to kiss him, then it would not be an assault. The law requires that there must be an intent to injure before there can be an assault. The injury in this case would be to the feelings, and the intent cannot be presumed, because no personal violence or battery was inflicted; and this intent the jury should have been permitted to pass upon under appropriate instructions." *Henderson, J.*,

REGINA v. CLARENCE.

(Court for Crown Cases Reserved, 1888. 22 Q. B. Div. 23.)

STEPHEN J. The question in this case is whether a man who knows that he has gonorrhoea, and who by having connection with his wife, who does not know it, infects her, is or is not guilty of an offense either under St. 24 & 25 Vict. c. 100, § 20, or under section 47 of the same act. Section 20 punishes every one who "unlawfully and maliciously inflicts any grievous bodily harm upon any other person." Section 47 punishes every one who is convicted of "an assault occasioning actual bodily harm to any person."

Before discussing in detail the meaning of these words I will make one general observation. The present case is the first, so far as appears, in which any person has ever been indicted, or at all events convicted, of any offense whatever for infecting another with a disease of any kind, although diseases of this kind are unhappily common and legislation in reference to them has taken place. The legislation in question is contained in St. 29 Vict. c. 35, and some other acts which amend it. These acts were repealed in 1886. They authorized the detention in hospitals of diseased women under certain circumstances, but they contained nothing to suggest that the communication of the disease was in itself a crime. If such had been the case, the acts in question would probably have been made supplementary to the ordinary administration of criminal justice.

If the present conviction is right, it must be so on some principle which would apply to women as well as to men, and to unmarried women as well as to wives. Section 47, indeed, could hardly apply to women; but section 20 would make no distinction between the sexes. It is also, I think, clear that, unless some distinction can be pointed out which does not occur to me, the sections must be held to apply, not only to venereal diseases, but to infection of every kind which is in fact communicated by one person to another by any act likely to produce it. A man who, knowing that he has scarlet fever or smallpox, shakes hands with a friend and so infects him, may be said to fall under section 20 or section 47 as much as the prisoner in this case. To seize a man's hand without his consent is an assault; but no one would consent to such a grasp if he knew that he risked smallpox by it, and if consent in all cases is rendered void by fraud, including suppression of the truth, such a gesture would be an assault occasioning actual bodily harm as much as the conduct of the prisoner in this case.

in *Chambless v. State*, 46 Tex. Cr. R. 1, 79 S. W. 578 (1904). Accord: *Stripling v. State* (Tex. Cr. App.) 80 S. W. 376 (1904). It was held in *Fuller v. State*, 44 Tex. Cr. R. 463, 72 S. W. 184, 100 Am. St. Rep. 871 (1903), that one is not guilty of an assault who, standing several feet from a woman, makes a "kissing sign"—puckering his lips and smacking them—to her.

Not only is there no general principle which makes the communication of infection criminal, but such authority as exists is opposed to such a doctrine in relation to any disease. The following are the authorities on this subject. By St. 1 Jac. I, c. 31, § 7, it was made felony for any person, who had under other provisions of the act been commanded to keep his house, "to go abroad and converse in company having any infectious sore upon him uncured." Upon this Hale, 1 P. C. 432, remarks that the statute is now discontinued, and he adds: "But what if such person goes abroad to the intent to infect another, and another is thereby infected and dies? Whether this be not murder by the common law might be a question, but if no such intention evidently appears though de facto by his conversation another be infected, it is no felony by the common law, though it be a great misdemeanor, and the reasons are: (1) Because it is hard to discern whether the infection arise from the party or from the contagion of the air. It is God's arrow, etc. (2) Nature prompts every man in what condition soever to preserve himself, which cannot be well without mutual conversation. (3) Contagious diseases, as plague, pestilential fevers, smallpox, etc., are common among mankind by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far and give too great latitude and loose to severe punishments." Some of the expressions in this passage would scarcely be employed now, but it may be taken as a caution against wide and uncertain extensions of the criminal law, and as a distinct proof that Hale did not regard the transmission of disease as an ordinary case of the infliction of bodily harm. His statement that, though not a felony, it would be a great misdemeanor at common law to infect another unintentionally by going about with a plague sore, may at first sight appear to favor the maintenance of the conviction in this place; but it is, I think, explained and its generality is limited by *Rex v. Vantandillo*. It was held in that case to be an indictable misdemeanor to carry a child which had the smallpox along a street, and the passage from Lord Hale was the principal authority relied upon. The offense referred to by Lord Hale is therefore the offense of committing a public nuisance, and his authority is opposed, rather than favorable, to the notion that to infect another with a contagious disease is in the nature of an offense against the person. The provisions of Public Health Act 1875 (St. 38 & 39 Vict. c. 55) §§ 120-130, and in particular section 126, treats offenses by spreading infection in the same way. By that section an infected person, who without proper precautions exposes himself in any street, etc., is liable to a penalty of £5. These considerations make it antecedently improbable that the abominable conduct of which the prisoner has been convicted should be in the strict legal sense of the word a crime.

Infection by the application of an animal poison appears to me to be of a different character from an assault. The administration of

poison is dealt with by section 24, which would be superfluous if poisoning were an "infliction of grievous bodily harm either with or without a weapon or instrument." The one act differs from the other in the immediate and necessary connection between a cut or a blow and the wound or harm inflicted, and the uncertain and delayed operation of the act by which infection is communicated. If a man by a grasp of the hand infects another with smallpox, it is impossible to trace out in detail the connection between the act and the disease, and it would, I think, be an unnatural use of language to say that a man by such an act "inflicted" smallpox on another. It would be wrong in interpreting an act of Parliament to lay much stress on etymology, but I may just observe that "inflict" is derived from "infligo," for which, in Facciolati's Lexicon three Italian and three Latin equivalents are given, all meaning "to strike," viz., "dare," "ferire," and "percuotere," in Italian, and "infero," "impingo," and "percutio," in Latin.

There is authority for the proposition that poisoning is not an assault, though in the case of *Reg. v. Button*, 8 C. & P. 660, in 1838, Serjeant Arabin, after consulting the Recorder of London, Mr. Law, held that it was. In *Reg. v. Dilworth*, 2 Mo. & Ro. 531, in 1843, a man was indicted for administering poison with intent to murder, and it was suggested that if the intent was not made out the prisoner might be convicted under St. 1 Vict. c. 85, of a common assault, as it was involved in the charge, and *Reg. v. Button*, 8 C. & P. 660, was cited; but Coltman, J., said that he disagreed with *Reg. v. Button*, 8 C. & P. 660, and that the prisoner must either be convicted or acquitted of the whole charge. In *Reg. v. Hanson*, 2 C. & K. 912, in 1849, Vaughan Williams, J., after consulting Cresswell, J., held that the administration of cantharides was neither a common assault nor a common law misdemeanor; and *Reg. v. Walkden*, 1 C. C. C. 282, was a decision to the same effect by Parke, B.¹ Upon these grounds I am of opinion that section 20 does not apply to the case.

Is the case, then, within section 47 as "an assault occasioning actual bodily harm"? The question here is whether there is an assault. It is said there is none, because the woman consented; and to this it is replied that fraud vitiates consent, and that the prisoner's silence was a fraud. Apart altogether from this question, I think that the act of infection is not an assault at all, for the reasons already given. Infection is a kind of poisoning. It is the application of an animal poison, and a poisoning, as already shown, is not an assault. Apart, however, from this, is the man's concealment of the fact that he was infected such a fraud as vitiated the wife's consent to his ex-

¹ Accord: *Garnet v. State*, 1 Tex. App. 605, 28 Am. Rep. 425 (1877). Contra. *Commonwealth v. Stratton*, 114 Mass. 303, 20 Am. Rep. 350 (1873); *Carr v. State*, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863, 41 Am. St. Rep. 408 (1893); *State v. Monroe*, 121 N. C. 677, 28 S. E. 547, 43 L. R. A. 861, 61 Am. St. Rep. 686 (1897).

ercise of marital rights, and converted the act of connection into an assault? It seems to me that the proposition that fraud vitiates consent in criminal matters is not true, if taken to apply in the fullest sense of the word and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as, for instance, by promises not intended to be fulfilled. These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true. I do not at all deny that in some cases it applies, though it is often used with reference to cases which do not fall within it. For instance, it has nothing to do with such cases as assaults on young children. A young child who submits to an indecent act no more consents to it than a sleeping or unconscious woman. The child merely submits without consenting. The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud as to the identity of the person by whom it is done, the law is not quite clear. In *Reg. v. Flattery*, 2 Q. B. D. 410, in which consent was obtained by representing the act as a surgical operation, the prisoner was held to be guilty of rape. In the case where consent was obtained by the personation of a husband, there was before the passing of the criminal law amendment act of 1885 a conflict of authority. The last decision in England, *Reg. v. Barrow*, Law Rep. 1 C. C. R. 158, decided that the act was not rape, and *Reg. v. Dee*, 14 L. R. Ir. 468, decided in Ireland in 1884, decided that it was. The criminal law amendment act of 1885 "declared and enacted" that thenceforth it should be deemed to be rape, thus favoring the view taken in *Reg. v. Dee*, 14 L. R. Ir. 468. I do not propose to examine in detail the controversies connected with these cases. The judgments in the case of *Reg. v. Dee*, 14 L. R. Ir. 468, examine all of them minutely, and I think they justify the observation that the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not a consent to sexual connection or indecent behavior. Consent to connection with a husband is not consent to adultery.

I do not think that the maxim that fraud vitiates consent can be

carried further than this in criminal matters. It is commonly applied to cases of contract, because in all cases of contract the evidence of a consent not procured by force or fraud is essential; but even in these cases care in the application of the maxim is required, because in some instances suppression of the truth operates as fraud, whereas in others at least a suggestion of falsehood is required. The act of intercourse between a man and a woman cannot in any case be regarded as the performance of a contract. In the case of married people that act is a part of a great relation based upon the greatest of all contracts, but standing on a footing peculiar to itself. In all other cases the immorality of the act is inconsistent with any contract relating to it. Thus in no case can considerations relating to contract apply to it. The effect of fraud upon a contract is to render it voidable at the option of the party defrauded. This clearly cannot apply to sexual intercourse. It is either criminal if the woman does not consent, or if her consent is obtained by certain kinds of fraud, or it is, as this was, a breach of matrimonial duty, or it is not criminal at all.

The woman's consent here was as full and conscious as consent could be. It was not obtained by any fraud, either as to the nature of the act or as to the identity of the agent. The injury done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault. It is not stated at what interval after December 20th the disease showed itself; but there must have been some interval during which it was uncertain whether infection had been communicated or not. During this interval was the man guilty or not? If he was, it seems extraordinary to say that he had committed an assault from which an event which was not in his power could set him free. If he was not, it seems to me equally strange to say that he could be deprived of his innocence by such an event. In some instances, no doubt, such an interval might elapse. If a man laid a trap for another, into which he fell after an interval, the man who laid it would during the interval be guilty of an attempt to assault, and of an actual assault as soon as the man fell in. In the case of death inflicted by violence, the criminal might at first be guilty of an assault or an unlawful wounding, and his crime would become murder or manslaughter on the death of the person wounded; but in the case of an attempt the intention to consummate the crime exists from the first, and in the case of murder the act which ultimately becomes murder is in itself a crime, whether death ensues or not. In this case there was no intention, and therefore no attempt to infect, and it seems anomalous to make a consequence which, though highly probable, was neither intended nor necessary, relate back on its occurrence in such a way as to turn an act not punishable itself into a crime.

Two authorities were quoted to show that such an act as this is a crime. They are *Reg. v. Bennett*, 4 F. & F. 1105, in which Willes, J., decided in 1866 that a man who infected his niece, a girl of 13,

might be convicted of an indecent assault, though she consented to sleep with him, and *Reg. v. Sinclair*, 13 Cox, C. C. 28, in which this decision was followed in 1867 by Shee, J. The case of *Reg. v. Bennett*, 4 F. & F. 1105, was disapproved of in *Hegarty v. Shine*, 2 L. R. Ir. 273, 4 L. R. Ir. 288, though, as the Irish courts point out, the verdict may possibly have been justified by the facts as proved; the girl having sworn that she was asleep and could not say what happened to her. If this was believed, there was evidence of indecent assault, at least, if not of rape. *Reg. v. Sinclair*, 13 Cox, C. C. 28, was decided on the authority of *Reg. v. Bennett*, 4 F. & F. 1105.

For these reasons I think there was no assault in the present case, and that therefore it does not fall within section 20.

I wish to observe on a matter personal to myself that I was quoted as having said in my *Digest of the Criminal Law* that I thought a husband might, under certain circumstances, be indicted for rape on his wife. I did say so in the first edition of that work, but on referring to the last edition (page 124, note) it will be found that that statement was withdrawn.

I think that this conviction should be quashed. No one can doubt the abominable nature of the prisoner's conduct; but, if it is to be treated as a crime, it must, I think, be done upon express statutory authority. The whole matter is surrounded with difficulties with which the Legislature alone is competent to deal, and to which it would be out of place to refer.

I am informed that my Brother GRANTHAM agrees with this judgment.²

FIELD, J. This indictment contains two counts, expressed, respectively, in the actual words of St. 24 & 25 Vict. c. 100, §§ 20, 47, and charging the prisoner under section 20 with "unlawfully and maliciously inflicting" upon his wife "grievous bodily harm," and under section 47 with "an assault" upon his wife "occasioning actual bodily harm." The facts proved were that the prisoner had sexual intercourse with his wife at a time when to his knowledge he was suffering from gonorrhœa, his wife being ignorant of this fact; that, had she known of it, she would not have consented to the intercourse; and that the result of the connection was to communicate to her the disease. The learned Recorder of London directed the jury that if these facts were established they might find the prisoner guilty on both or either of the counts. The jury found the prisoner guilty, and the learned Recorder has stated the case now before us, in which he asks the opinion of this court whether his direction was right in point of law, and whether upon these facts the prisoner could be properly convicted on both or either of the counts.

The answer to this question depends on the true construction of the act under which the indictment was preferred, and on a considera-

² Coleridge, C. J., Manisty, Willes, and Smith, J.J., and Pollock, B., delivered concurring opinions, in which Matthew, J., and Huddleston, B., agreed.

tion of the authorities, and I have come to the conclusion that the direction of the learned Recorder was right, and that the prisoner was properly convicted on both counts.

The questions, then, are: First, did the prisoner "unlawfully and maliciously inflict grievous bodily harm" on his wife? Secondly, did the prisoner "occasion bodily harm" to his wife by an "assault"?

Now, it has long been established that a man who takes indecent liberties with a woman, or has or attempts to have connection with her, may be properly convicted either of indecent assault or rape, which includes an assault, according to the circumstances of the case, if the acts were done without her consent, express or implied, or against her will. It is, I think, also clear that if the condition of the man is such that it is an ordinary and natural consequence of the contact to communicate an infectious disease to the woman, and he does so, he does in fact inflict upon her both "actual" and "grievous bodily harm." Such an act produces what a great authority, Lord Stowell, describes as "an injury of a most malignant kind." See the note to *Durant v. Durant*, 1 Hagg. Eccl. Cases, 768. It is also well settled that every sane man must be taken to intend the natural and reasonable consequences of his acts, and the intentional infliction of grievous bodily harm, unless justified or excused by law, is to my mind "malicious and unlawful."

Thus far the case rests upon what seem to me to be known and generally adopted principles. But it is argued that here there is no offense, because the wife of the prisoner consented to the act, and I entertain no doubt that, if that was so, there was neither assault nor unlawful infliction of harm. Then, did the wife of the prisoner consent? The ground for holding that she did so, put forward in argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from 1 Hale's Pleas of the Crown, p. 629, was cited, in which it is said that a husband cannot be guilty of rape upon his wife, "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract." The authority of Hale, C. J., on such a matter, is undoubtedly as high as any can be; but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime. Suppose a wife, for reasons of health, refused to consent to intercourse, and the husband induced a third person to assist him while he forcibly perpetrated the act; would any one say that the matrimonial consent would render this no crime? And there is the great authority of Lord Stowell for saying that the husband has no right to the person of his wife if her health is endangered. *Popkin v. Popkin*, 1 Hagg. Eccl. Cases, note to *Durant v. Durant*, 765. It seems to me, however, unnecessary to decide that question in the

present case, because the prisoner's wife undoubtedly did consent in fact to the act of intercourse, and therefore consented to all natural and ordinary attendant circumstances or consequences of the act, and also to such as were reasonably within her knowledge and contemplation.

Had, then, the harm inflicted upon or occasioned to the prisoner's wife been one of the consequences of an ordinary natural and healthy connection, or had she known or had reasonable grounds for thinking that her husband was in a diseased condition, her consent to the consequences would, I think, be implied, and so no offense would have been committed. In the same way I think that, if a man knowingly consorts with a prostitute, who gains her livelihood by promiscuous intercourse, it may well be implied that he accepts all the consequences; also, had the prisoner in this case not been aware of his condition, his act would not have been malicious or an assault, for, as he would have had no reason to suppose that his wife would do other than consent, he would have a right to act upon the implication; and I think, therefore, that upon the construction which I am putting upon the act there will be no danger of bringing within its definitions an injury caused by an innocent or merely thoughtless act of affection between husband and wife. But I have said that here there undoubtedly was consent on the part of the prisoner's wife to the act of intercourse, and it is now necessary to consider what were the actual circumstances attending this act of intercourse, and what was the nature and condition of the intercourse to which the consent was given.

The actual circumstances were that the prisoner, knowing he had a foul and infectious disease upon him, and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited intercourse. He also knew that his wife consented to it in ignorance of his condition. Under these circumstances, I think that her consent to the intercourse in fact was given upon the implied condition that to the knowledge of the prisoner the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent; i. e., a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature—one which, in all probability, would communicate to her a foul disease, and to which the jury have found that she would not have consented, had she known the state of his health. It seems to me, therefore, to follow that the mere consent of the prisoner's wife to an act innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did, and, moreover, that he obtained such consent as she gave by willfully suppressing the fact that he was suffering from disease. Such an act between husband and wife is, I cannot doubt, unlawful. In the divorce court it has been held that the willful or reckless communication of disease by the one to the other amounts to legal cruelty, involving the liability to rescission of the marriage contract so far as regards cohabitation and intercourse.

Boardman v. Boardman, L. R. 1 P. & D. 233. There was, I think, a clear duty cast upon the prisoner before he solicited the intercourse to communicate his condition to his wife, and the imposition of intercourse without such communication amounted to a false representation by act and conduct that he was in the same healthy and natural condition as he had been upon previous occasions of lawful intercourse.

The result, therefore, at which I have arrived is that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse, because, although he knew, yet his wife did not know, and he willfully left her in ignorance as to the real nature and character of that act. This being so, it follows that there was both an assault and a criminal infliction of harm.

I have arrived at this result by my own unaided construction of the statute and consideration of the law. I now proceed to consider the authorities. They may be divided, according to the facts which they present, into three classes of cases. The first class consists of cases in which a wife's consent has been obtained by the fraud of the prisoner, inducing her to believe that he was her husband. *Reg. v. Saunders*, 8 C. & P. 265; *Reg. v. Williams*, 8 C. & P. 286. The second class consists of cases in which the woman's consent was obtained by fraudulent conduct, inducing her to believe that she was undergoing medical treatment or examination. *Rex v. Rosinski*, 1 Moody, C. C. 19; *Reg. v. Case*, 4 Cox, C. C. 220; *Reg. v. Flattery*, 2 Q. B. D. 410. The third class consists of cases in which, as in the present case, the consent of the woman was given in consequence of the willful and unlawful suppression of an injurious change of natural and previously known conditions. *Reg. v. Bennett*, 4 F. & F. 1105; *Reg. v. Sinclair*, 13 Cox, C. C. 28; *Hegarty v. Shine*, 14 Cox, C. C. 124, C. A. 145. Although these cases differ in themselves as to the facts and as to the language used by the court, all of them, except *Hegarty v. Shine*, 14 Cox, C. C. 124, C. A. 145, are, as it seems to me, governed by the same principle, which is that, though the woman consented to the act of intercourse, she did not consent to it in its actual nature and conditions. In *Reg. v. Case*, 4 Cox, C. C. 220, the girl did not resist from a bona fide belief, willfully induced by the prisoner, that she was being treated medically, and the learned Recorder of London, a judge of wide experience in criminal cases, directed the jury that, if they were satisfied that the act was committed under such circumstances, the prisoner's conduct amounted to an assault. This direction was approved by Wilde, C. J., who says in his judgment: "She made no resistance to an act which she supposed to be quite different from what was done, and therefore that which was done was done without her consent. Coleridge, J., whose knowledge and experience in these matters could not be surpassed, said: "She makes no resistance only in consequence of the confidence which she reposed in the defendant as her medical adviser. If there had been no consent, the defendant's act would have been indisputably an assault." Platt, B., said:

"The girl consents to one thing, and the defendant does another; that other involving an assault." This was a decision of the Court for the Consideration of Crown Cases Reserved. In the case of *Reg. v. Flattery*, 2 Q. B. D. 410, in the same court, a case of the second class, the same doctrine was held; Kelly, C. B., saying: "The girl only submitted to the plaintiff touching her person in consequence of the fraud and false pretenses of the prisoner, and the only thing she consented to was the surgical operation."

In these cases the fraud by which the consent was obtained was a fraud as to person and circumstances, and did not, as in this case, relate to the very act of connection, its physical nature and conditions, and it seems to me to follow that a consent induced by a fraud relating to the physical nature and conditions of the act itself falls still more clearly within this principle. Accordingly so it was held in *Reg. v. Bennett*, 4 F. & F. 1105. There that very eminent judge, Willes, J., applied this doctrine, and held that the consent to one act obtained by fraud as to its physical nature was no consent to a different act injurious in its nature, and to which the consent was never intended to be applied. In this respect he was followed by Shee, J., in *Reg. v. Sinclair*, 13 Cox, C. C. 28.

It is true that in *Hegarty v. Shine*, 14 Cox, C. C. 124, C. A. 145, some of the judges in the Irish courts expressed disapproval of the ruling of Willes, J., in *Reg. v. Bennett*, 4 F. & F. 1105, as tending to show that any fraud is sufficient to convert a civil act of breach of duty into a criminal one, and reliance was placed on this in the argument against the conviction. But I think this disapproval rests upon a misunderstanding of the ruling of Willes, J. As I understand, that very learned judge never meant to say that any fraud must vitiate the consent, but that a consent obtained to one act is not a consent to an act of a different nature, and if obtained by a fraud as to its nature would not render the act lawful. In *Hegarty v. Shine*, 14 Cox, C. C. 124, C. A. 145, in the Court of Appeal, *Reg. v. Bennett*, 4 F. & F. 1105, was distinguished, and in no way departed from, and the actual decision in *Hegarty v. Shine*, 14 Cox, C. C. 124, C. A. 145, does not seem to me in any way to touch the present case.

I think, therefore, that the conviction should be affirmed. I am desired to add that my Brother CHARLES concurs in this judgment.³

Conviction quashed.

³ Hawkins, J., delivered a concurring opinion, with which Day, J., agreed.

Threats unaccompanied by any overt act afford no justification for an assault. *People v. Wright*, 45 Cal. 260 (1873); *Rauck v. State*, 110 Ind. 384, 11 N. E. 450 (1886).

At common law insulting remarks do not justify an assault. *State v. Herrington*, 21 Ark. 195 (1866); *State v. Griffin*, 87 Mo. 608 (1885). But this rule has been changed by statute in some states. *Spigner v. State*, 103 Ala. 30, 15 South. 892 (1893); *Murphy v. State*, 92 Ga. 75, 17 S. E. 845 (1893); *Wood v. State*, 64 Miss. 761, 2 South. 247 (1887).

REGINA v. COTESWORTH.

(Nisi Prius, 1704. 6 Mod. 172.)

The indictment was for a battery upon Dr. R. The evidence was that the defendant spit in his face.

HOLT, C. J. It is a battery.

Though one cannot justify a battery by son assault demesne, by pleading it to an indictment, yet he may give it in evidence upon a not guilty, and he may be thereupon acquitted.

REX v. GILL.

(King's Bench, 1719. 1 Str. 190.)

Indictment for throwing down skins into a man's yard, which was a public way, per quod another man's eye was beat out. On the evidence it appeared the wind took the skin, and blew it out of the way, and so the damage happened. The CHIEF JUSTICE remembered the case of the hoy (1 Str. 128) and that in Hob. 134, where, in exercising, one soldier wounded another, and a case in the Year Book of a man lopping a tree, where the bough was blown at a distance and killed a man; and in the principal case the defendants were acquitted.

STATE v. DAVIS.

(Court of Appeals of South Carolina, 1832. 1 Hill, 46.)

Indictment for assault and battery, at Edgefield. Fall term, 1832. Verdict—Guilty.

JOHNSON, J., delivered the opinion of the court.

The case made by the judge's notes, taken on the trial, and the concessions at the bar, appears to be this: Mr. Griffin, a gentleman of the bar, placed in the hands of James Robertson, the prosecutor, one of the deputy sheriffs of Edgefield district, a paper purporting to be a mortgage on a negro, then in the possession of Davis. Robertson found the negro at Hamburg, and took him into his possession; and having occasion to stop for the night on his way to Edgefield, when he went to bed he chained the negro to his bedpost, and in addition to this tied the negro with a rope, one end of which was tied to his own body. The defendants came to the house at night, and avowed their determination to retake the negro at all hazards, and, despite of Robertson's remonstrances, broke the chain, cut the rope, and carried the negro off, without having done any other violence to the person of the prosecutor; and the leading question is whether this, in law, was an assault.

The general rule is that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illustration. No actual violence is done to the person in any one of these instances; and I take it as very clear that that is not necessary to an assault. It has therefore been held that beating a house in which one is, striking violently a stick which he holds in his hand, or the horse on which he rides, is an assault; the thing in these instances partaking of the personal inviolability. *Respublica v. De Longchamps*, 1 Dall. (Pa.) 114, 1 L. Ed. 59; *Wamborough v. Schanck*, Pen. Rep. 229, cited 2 part. Esp. Dig. 173. What was the case here? Laying the right of property in the negro out of the question, the prosecutor was in possession, and, legally speaking, the defendants had no right to retake him with force. As far as words could go, their conduct was rude and violent in the extreme. They broke the chain with which the negro was confined to the bedpost, in which the prosecutor slept, and cut the rope by which he was confined to his person, and are clearly within the rule. The rope was as much identified with his person as the hat or coat which he wore, or the stick which he held in his hand. The conviction was, therefore, right.

Motion dismissed.¹

FOSTER v. PEOPLE.

(Court of Appeals of New York, 1872. 50 N. Y. 598.)

ANDREWS, J.² The prisoner intentionally aimed a blow at the head of the deceased with a dangerous weapon, and with a force likely to fracture the skull, and which in fact did crush it; and it is insisted that upon this evidence, and in the absence of any proof of antecedent or subsequent facts tending to establish it, the jury might have found

¹ Compare *Kirland v. State*, 43 Ind. 146, 13 Am. Rep. 386 (1873).

For battery by the use of excessive force, where some degree of force was justifiable, see *Floyd v. State*, ante, p. 239.

In England and in the United States statutes have been enacted creating certain aggravated assaults and batteries substantive crimes, and increasing the common-law punishment. Among others are:

Assault with a deadly weapon, *People v. War*, 20 Cal. 117 (1862).

Assault with intent to maim, *Rex v. Holt*, ante, p. 93.

Assault with intent to inflict grievous bodily harm, *Rex v. Gillow*, ante, p. 115.

Assault with intent to murder, *Rex v. Holt*, ante, p. 93; *Simpson v. State*, ante, p. 202; *State v. Morgan*, ante, p. 256.

Assault with intent to ravish, *Whitten v. State*, ante, p. 181.

Maliciously wounding, *Reg. v. Latimer*, ante, p. 89.

Wounding with intent to prevent lawful apprehension, *Rex v. Duffin*, ante, p. 92.

Stabbing, *Floyd v. State*, ante, p. 239.

² Part of the opinion is omitted.

that the prisoner's intent was to fracture the skull or injure the head, and not to kill, and if such intent had been found there was an assault with an attempt to maim, within the statute. Mayhem at common law is defined by Blackstone as violently depriving another of the use of such of his members as may render him less able, in fighting, either to defend himself or to annoy his adversary. 4 Bl. 204.

It was recognized as a felony at a very early period of the common law, and the offender was punished by the loss of the same member of which he had deprived the party maimed—"membrum pro membro."

It was treated as an offense against the state, for the reason assigned by Lord Coke (1 Inst. 127): "For the members of every subject are under the safeguard and protection of the law, to the end a man may serve his king and country when occasion shall be offered."

The special injuries which constitute mayhem are stated by Hawkins as follows:

"And therefore the cutting off or disabling or weakening a man's hand or finger, a striking out his eye or foretooth, or castrating him, are said to be maims; but the cutting off his ear or nose are not esteemed maims, because they do not weaken, but only disfigure, him." 1 Hawkins' Pleas of the Crown, 107.

And Blackstone treats it as an injury resulting in a permanent disability, and says it is attended with this aggravating circumstance: that thereby the party injured "is forever disabled from making so good a defense against future external injuries as he otherwise might have done." 3 Bl. 131.

An injury to the head or skull is not specified by Hawkins or Blackstone as mayhem; and as the usual consequence of such an injury is either death or temporary disability, it does not seem to be embraced within the definition of that crime as given by these commentators.

In the definition of mayhem by Lord Coke the breaking of the skull is included.

"Mayhem," he says, "signifieth a corporal hurt, whereby a man loseth a member, by reason whereof he is less able to fight, as by putting out his foretooth, breaking his skull, striking off his arm, hand, or finger, cutting off his leg or foot, or whereby he loseth the use of any of his said members." Coke, Litt. 288a.

And Lord Coke refers to the authority of Glanville and Britton in support of this definition:

"Mayhem," says Glanville, "signifies the breaking of any bone or injuring the head by wounding or abrasion. In such case the accused is obliged to purge himself by the ordeal—that is, by the hot iron, if he be a freeman; by water, if he be a rustic." Glanville (Blain's Translation) book 14, c. 1, 350. See, also, Britton (Nichols' Translation) liv. 1, c. 26, fols. 48b, 49a, 123.

Some recognized instances of mayhem are omitted in Glanville's definition, and it would seem to include any injury to the head, how-

ever trivial. But no authority has been cited subsequent to the time of Lord Coke, nor has any come to our notice, for the proposition that a fracture of the skull is mayhem, except that Mr. East, in his *Pleas of the Crown* (page 393), after giving the general definition of mayhem at common law, and instances in illustration of it, concludes, "or as Lord Coke adds, breaking the skull."

But, whatever acts may have been recognized as mayhems at a remote period of the common law, the crime and the punishment became the subject of statute definition and regulation. Some statutes had been passed upon the subject prior to the reign of Charles II, but the first general and comprehensive one was St. 22 & 23 Car. II, c. 1, entitled "An act to prevent malicious maiming and wounding."

Chitty speaks of it as the most important and extensive ancient statute upon this subject. *Criminal Law*, vol. 3, p. 785. And Blackstone says that this and the prior statutes "put the crime and punishment of mayhem more out of doubt." 4 Bl. 206.

By this statute it is enacted that any person who "shall on purpose and of malice aforethought, by lying in wait, unlawfully cut out or disable the tongue, put out the eye, slit the nose or lip, or cut off or disable any limb or member of any subject, with intention in so doing to maim or disfigure him in any of the manners aforesaid," shall be guilty of felony without benefit of clergy.

Whatever may have been the law of mayhem in England antecedent to this statute, no case can be found, we think, arising since its enactment, in which an injury to the head, or any act or injury, has been regarded as mayhem, other than the acts and injuries enumerated in this statute.

It has been regarded as defining what before may have been uncertain. And it was held in *Rex v. Lea*, 1 Leach, 51, where a husband had cut the throat of his wife quite across, that it was not maiming within this statute.

The act of Car. II has been the basis of the legislation of this state on the subject of maiming.

The first act was passed in 1788, and is entitled "An act to prevent malicious wounding and maiming."

This act was followed by the act of 1801, entitled "An act to prevent malicious maiming," which latter act was substantially a re-enactment of the former, except in respect to punishment.

In both statutes the enumeration and description of the injuries which are made punishable is the same as in the English statute, and no others are included.

The Revised Statutes (2 Rev. St. [1st Ed.] p. 664, pt. 4, c. 1, tit. 2, § 27) declare "that every person, who, from a premeditated design, etc., shall, first, cut out or disable the tongue; or, second, put out an eye; or, third, slit the lip or destroy the nose; or, fourth, cut off or disable any limb or member of another on purpose, upon conviction

thereof, shall be imprisoned in a state prison," etc.—following the enumeration in the previous statutes.²

The statute of Car. II has been followed, also, in the legislation by Congress and of many of the states of the Union. See collection of statutes in Wharton's Criminal Law, title "Mayhem."

We are of opinion that since that statute the crime of mayhem includes those injuries only which are therein enumerated, and that the section of the Revised Statutes above cited was intended as a statute definition of that crime.

It does not declare, in terms, that the acts therein enumerated constitute maiming; but the section is contained in the article entitled "Of Rape, Maiming, etc.," and the injuries are those which are generally known as maiming, and it includes all the cases which, since the time of Lord Coke, have come within that designation.

In *Reg. v. Sullivan*, 1 C. & Marsh. 209, the prisoner was indicted under St. 7 Wm. IV & 1 Vict. c. 85, which enacted that any one who shall stab, cut, or wound any person, with intent to maim, disfigure, or disable such person, or to do some other grievous bodily harm, etc., shall be guilty of felony.

It appeared in the evidence that the prisoner with an ax struck the prosecutor on the head with the edge of it, and inflicted a cut upon it.

Parke, B., in charging the jury, said: "There is no proof of an intent to maim or disable, as the blow was aimed at the head of the prosecutor. It would have been otherwise if it had been aimed at the arm, to prevent his being able to use it. The question, therefore, will be whether there was a wounding with intent either to murder the prosecutor or to do him some grievous bodily harm."

This is a direct authority, and the opinion of an eminent judge, in support of the views herein expressed.

It is to be observed, moreover, that the case did not arise under the statute of Charles, which was repealed by St. 9 Geo. IV, c. 31; so that it stood upon the construction of the words "to maim," in the statute of Victoria.

We might here close the consideration of this case; but we are of opinion that the result would not be changed, although it should be held, according to Lord Coke's definition, that breaking of the skull is or might be a maiming.

The refusal of the court to charge that if the prisoner intended to maim, and not to kill, the offense was murder in the second degree, was proper, for the reason that there was no evidence upon which the

² The present statute provides that "a person who willfully with intent to commit a felony, or to injure, disfigure, or disable, inflicts upon the person of another an injury, which (1) seriously disfigures his person by any mutilation thereof; or (2) destroys or disables any member or organ of his body; or (3) seriously diminishes his physical vigor by the injury of any member or organ; is guilty of maiming, and is punishable by imprisonment for a term not exceeding fifteen years. The infliction of the injury is presumptive evidence of the intent." Pen. Code, § 206.

jury could have found that the prisoner intended to fracture the skull of the deceased, as distinguished from an intent to kill him.

If the prisoner acted from premeditation he may have intended to kill the deceased, or simply to do him a bodily injury; but that he intended the particular injury of breaking the skull only cannot be inferred.

If a blow aimed at an arm is by accident deflected from its course and inflicts a mortal wound, in such or similar cases, an intent to maim only might be found by the jury; and if, in this case, death had not resulted, the prisoner might, perhaps (assuming that the fracture of the head was a maiming), have been convicted of an intent to maim. East's Pleas of the Crown, tit. "Mayhem," Vict. I, 400; *Rex v. Cooke*. 1 St. Tr. 54.

All concur.

Judgment affirmed.³

³ Under the statutes in most states an intent to maim is an essential element of mayhem; but it is generally held that this intent will be presumed from the act of maiming, or if the means used were such as would naturally result in maiming. *Molette v. State*, 49 Ala. 18 (1873); *State v. Jones*, 70 Iowa, 505, 30 N. W. 750 (1886); *State v. Hair*, 37 Minn. 351, 34 N. W. 893 (1887); *People v. Wright*, 93 Cal. 564, 29 Pac. 240 (1892). In other states it is held that no specific intent to maim is necessary, but that it is sufficient if the act were done willfully or maliciously. *Davis v. State*, 22 Tex. App. 45, 2 S. W. 630 (1886); *Terrell v. State*, 86 Tenn. 523, 8 S. W. 212 (1888).

CHAPTER IX.

FALSE IMPRISONMENT AND KIDNAPPING.

False imprisonment * * * is described to be every restraint of a man's liberty under the custody of another, either in a goal, house, stocks, or in the street, whenever it is done without a proper authority * * * and the punishment for the offence is as in the case of other misdemeanors. * * *

The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offence at common law, punishable by fine, imprisonment and pillory.

1 East, P. C. c. IX.

SMITH v. STATE.

(Supreme Court of Tennessee, 1846. 7 Humph. 43.)

GREEN, J., delivered the opinion of the court.¹

The plaintiff in error was indicted for an assault and false imprisonment of Mark M. Rodgers. The court charged the jury "that, to make out the offense as charged, no actual force was necessary, but that a man might be assaulted by being beset by another; and if the opposition to the prosecutor's going forward was such as a prudent man would not risk, then the defendant would, in contemplation of law, be guilty of false imprisonment."

This charge is correct in all its parts, and the facts were fairly left to the jury. A verdict of guilty has been pronounced, and we do not feel authorized to disturb it. The prosecutor and defendant disputed about the ferriage defendant claimed. Smith insisted upon his demand, and said he did not choose to sue every man that crossed at his ferry. Although he did not take hold of the prosecutor, or offer violence to his person, yet his manner may have operated as a moral force to detain the prosecutor.

And this appears the more probable, as after the affair was settled the prosecutor inquired what defendant would have done if he had not paid the ferriage demanded, to which the defendant replied that "he would have put his carryall and horse back into the boat and taken them across the river again." As this determination existed in his

¹ The opinion only is printed.

mind, it doubtless was exhibited in the manner of the defendant, and thus operated upon the fears of the prosecutor.

Affirm the judgment.²

DESIGNY'S CASE.

(King's Bench, 1683. T. Raymond, 474.)

Designy, a merchant trading to Jamaica, spirited away the eldest son of one Turbet, who was a scholar at Merchant-Taylor's School, and a hopeful youth. Turbet exhibited an information against Designy, and upon not guilty pleaded he was found guilty at nisi prius before the Chief Justice Pemberton, the sitting after Trinity Term last, and this last Michaelmas Term he appeared in court, and was fined £500 and to lie in prison till he paid it.³

² In *Bird v. Jones*, 7 Q. B. 742 (1854), the court, Denman, C. J., dissenting, held that where the plaintiff attempting to pass in a particular direction, was obstructed, and prevented from going in any direction but one, not being that in which he had endeavored to pass, there was no imprisonment.

³ Only so much of the case as relates to kidnapping is printed.

In *Burns v. Commonwealth*, 129 Pa. 138, 18 Atl. 756 (1889), it was held that where, on a decree for divorce, the custody of the child was assigned to the mother, and the father seized and carried it away, he was not guilty of kidnapping, either at common law or under the statute.

Contra, under the statute of New Hampshire: *State v. Farrar*, 41 N. H. 53 (1860).

Kidnaping is a crime. It is a crime, independent of time or place.

Kidnaping of a person is a crime, independent of the place where it is committed.

A person who is taken from one place to another, and is not allowed to return, is a kidnaper.

The crime of kidnapping is a crime, independent of the place where it is committed.

The crime of kidnapping is a crime, independent of the place where it is committed.

The crime of kidnapping is a crime, independent of the place where it is committed.

The crime of kidnapping is a crime, independent of the place where it is committed.

2. Act. But not sufficient to constitute the crime, but the
3. Court of common law is sufficient.
4. Woman herself voluntarily procured the abortion. 317
1000 on 12 March 1850. 1000 on 12 March 1850. 1000 on 12 March 1850.

CHAPTER X.

ABORTION.

MILLS v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1850. 13 Pa. 631.)

Error to the court of quarter sessions of Dauphin county.

Mills had been tried for an attempt to procure abortion of a female, tried at November sessions, 1849. Defendant was convicted and sentenced to undergo punishment in the Dauphin county prison by separate confinement at labor for and during the term of one year, to commence and be computed from the expiration of the sentence on the indictment for attempting to procure abortion of another female, etc.

COULTER, J.¹ The error assigned is that the indictment charges the defendant, with intent to cause and procure the miscarriage and abortion of the said Mary Elizabeth Lutz, instead of charging the intent to cause and produce the miscarriage and abortion of the child. But it is a misconception of the learned counsel that no abortion can be predicated of the act of untimely birth by foul means.

Miscarriage, both in law and philology, means the bringing forth the fœtus before it is perfectly formed and capable of living, and is rightfully predicated of the woman, because it refers to the act of premature delivery. The word "abortion" is synonymous and equivalent to "miscarriage" in its primary meaning. It has a secondary meaning, in which it is used to denote the offspring. But it was not used in that sense here, and ought not to have been. It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman, because it interferes with or violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature, which obstructs the fountain of life, and therefore it is punished. The next error assigned is that it ought to have been charged in the count that the woman had become quick. But, although it has been so held in Massachusetts and some other states, it is not, I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. The allegation in this indictment was therefore sufficient, to wit: "That she was then and there pregnant and big with

¹ Part of this case is omitted.

1000 on 12 March 1850. 1000 on 12 March 1850. 1000 on 12 March 1850.

child." By the well-settled and established doctrine of the common law, the civil rights of an infant in ventre sa mere are fully protected at all periods after conception. 3 Coke's Institutes. A count charging a wicked intent to procure miscarriage of a woman, "then and there being pregnant," by administering potions, etc., was held good on demurrer by the Supreme Court of this state. Mss. Reps. January, 1846; Whart. Crim. Law, 308. There was therefore a crime at common law sufficiently set forth and charged in the indictment.

But, although we see no error in the record, the sentence must be reformed on account of certain proceedings in this court and de hors this record.

Judgment affirmed as modified.²

² Accord: *State v. Slagle*, 83 N. C. 630 (1880). Contra: *Commonwealth v. Parker*, 9 Metc. 263, 43 Am. Dec. 396 (1845); *State v. Cooper*, 22 N. J. Law, 52, 51 Am. Dec. 248 (1849).

CHAPTER XI.

RAPE.

There is amongst other appeals a certain appeal, which is called concerning the rape of virgins, and the rape of a virgin is a certain crime, which a woman charges against a man, by whom she says that she has been violently overpowered against the peace of the lord the king, which crime, if it be proved, there follows a penalty, namely the loss of members, that there shall be member for member, because when a virgin is deflowered, she loses a member and therefore the deflowerer should be punished in that member with which he has offended, let him therefore lose his eyes, on account of his looking at the beauty, for which he coveted possession of the virgin, and let him lose his testicles, which brought on the lust of ravishment. But this penalty does not follow in the case of every female, although she should be overpowered by violence. Nevertheless, another severe and still more severe penalty follows, according as she is a married woman or a widow living honestly, a woman of saintly character, or some other kind of matron. Likewise a lawful concubine or another making her livelihood without any discrimination of persons, all of whom the king ought to protect for the sake of his own peace, but there will not be in each case a like punishment. Formerly the deflowerers of virgins and of chastity were hanged, and their abettors, since such persons were not clear of the crime of homicide, and chiefly since virginity and chastity cannot be restored; but in modern times it is differently observed, that for the defilement of a virgin members are lost, as above said, and concerning others other grave corporal punishment follows, but nevertheless without the loss of life or members.¹

Bracton, f. 147.

REX v. W. D.

(King's Bench, 1570. Dyer, 304.)

One W. D. was arraigned in B. R. upon an indictment of rape on a girl or damsel of seven years of age, and no more; s. that he feloniously ravished and carnally knew her. And he pleaded not guilty. And by good evidence of divers women, matrons, he was found guilty. But the court doubted of rape in so tender a child. But if she had been nine years and more, it would have been otherwise.

¹ St. Westm. I (1275) fixed the punishment on conviction at two years imprisonment and ransom at the king's pleasure.

St. Westm. II (1285) provided the punishment of "life and member."

"For plain declaration of law, be it enacted, that if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof, being duly convicted, shall suffer as a felon without allowance of clergy."¹

St. 18 Eliz. c. 7, § 4.

REGINALD'S CASE.

(Warwickshire Eyre, 1221. Select Pleas of the Crown [Sel. Soc.] Pl. 166.)

Margery, daughter of Aelfric, appeals Reginald, son of Aunfrey of Coventry, for that in the king's peace on the vigil of St. Paul he raped her. * * * The jurors say that he is not guilty of rape, because a long time before this he had her of her own free will, and again two years afterward in the house of her father, and they say that no cry was raised. And so it is considered that he go thence quit; and she be in mercy for her false appeal. Let her be in custody.

DON MORAN v. PEOPLE.

(Supreme Court of Michigan, 1872. 25 Mich. 356, 12 Am. Rep. 253.)

CHRISTIANCY, C. J.² The court charged the jury as follows:

"If you find that the defendant represented to the complaining witness that, as a part of his medical treatment, it was necessary for her to have carnal connection with him, that such representations were false and fraudulent, that she believed it, and, relying upon it, consented to the solicitations of the defendant, and had connection with him, and that such representations were made for the purpose of inducing her to give such consent, and that without it she would not have yielded, the defendant is guilty of the crime charged against him."

It will be noticed that this charge leaves out and wholly ignores all idea of force as a necessary element of the crime charged; and the jury were, in effect, told that the defendant might be found guilty of the rape, though he neither used, nor threatened to use, any force whatever in case of her refusal, and though she might have assented

¹ The present statute (St. 48 & 49 Vict. c. 69) makes unlawful and carnal knowledge of a girl under 13 years felony, and between 13 and 16 years a misdemeanor. Similar statutes are in force in this country. Under these statutes penetration is necessary. *People v. Howard*, 143 Cal. 316, 76 Pac. 1116 (1904); *State v. Dalton*, 106 Mo. 463, 17 S. W. 700 (1891); *Hardtke v. State*, 67 Wis. 552, 30 N. W. 723 (1886). The consent of the female is, however, immaterial. See *Carothers v. State*, 75 Ark. 574, 88 S. W. 585 (1905); *State v. Day*, 188 Mo. 359, 87 S. W. 465 (1905).

² Part of this case is omitted.

without any constraint produced by the fear or apprehension of force, or any dangerous or serious consequences to herself if she refused or resisted.

This feature of the charge is assigned as error, and presents the only question raised in the case by the plaintiff in error.

The definition of rape, as generally given in the English books, is that "rape is the unlawful carnal knowledge, by a man of a woman, forcibly (or by force), and against her will." 3 Coke's Inst. (Thomas' Ed.) 549; 1 Hale, P. C. 628; Hawkins, P. C. (Cur. Ed.) 122; 4 Bl. Com. 210; 1 Russ. on Cr. (Greenl. Ed.) 675. This definition depended, perhaps, partly upon the common law, but mainly upon two early and rather loosely worded English statutes, one of which (St. Westm. II, c. 34) expressly made force an element in the crime, if the party were attainted at the king's suit (though not when the proceeding was by appeal), and the other (St. Westm. I, c. 13) which did not require force as an element, except as it might be inferred from the word, "ravished." See 2 Bish. Cr. L. §§ 1067 to 1069, where the substance of these statutes is given. And, as remarked by Mr. Bishop (2 Bish. Cr. L. § 1073), the more correct definition to be gathered from these statutes would have been: "Rape is the unlawful carnal knowledge by a man of a woman, by force, when she does not consent." The difference between the two definitions, however, would seem to be important only in cases where the female with whom the connection is had may be said to have no will, as in the case of an idiot, or insane person, or one in a state of unconsciousness, in which cases, if anywhere, the force necessary to accomplish the act itself without resistance could possibly be held to constitute the force contemplated by the definition of the offense. See *Rex v. Ryan*, 2 Cox C. C. 115; *Reg. v. Fletcher*, Bell, C. C. 63; *Reg. v. Camplin*, 1 Den. C. C. 89.² But this particular class of cases has no special bearing upon the case now before us (and we do not discuss it); nor are we embarrassed by any uncertainty in the definition of the offense.

Our statute has adopted substantially the definition first above given from the English authorities. Section 5730, Comp. Laws 1857, declares: "If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, * * * he shall be punished," etc.

In the interpretation of this statute, it is clear that the term "by force" must not be wholly rejected or ignored, but that some effect must be given to it, and the language of the provision certainly requires something more to be shown than if these words had been

² It is generally so held. See, *Intercourse with Imbecile*, *Reg. v. Fletcher*, 8 Cox, C. C., 131 (1859); *State v. Tarr*, 28 Iowa, 397 (1869); *State v. Atherton*, 50 Iowa, 189, 32 Am. Rep. 134 (1878); *State v. Williams*, 149 Mo. 496, 51 S. W. 88 (1899); with woman asleep, *Payne v. State*, 40 Tex. Cr. R. 202, 49 S. W. 604, 76 Am. St. Rep. 712 (1899); *State v. Welch*, 191 Mo. 179, 89 S. W. 945 (1905); with drunken woman, *Commonwealth v. Burke*, 105 Mass. 376, 7 Am. Rep. 531 (1870).

omitted; and it is equally clear that if that particular kind and amount of force only is required which is always essential to the act of sexual connection itself, when performed with the assent of the woman, then no effect whatever is given to the term "by force," but the interpretation and the effect of the statute will be precisely the same as if these words were not contained in it. This interpretation, therefore, is not permissible. Some effect must be given to the words; and such has been the almost, if not entirely, uniform course of decision, both in England and in this country, where the definition of the offense is substantially the same as that given by our statute, when the charge has been for the actual commission of the rape upon a female of the age of proper discretion, of sound mind, and in full possession of her faculties, however fraudulent the means, or false the pretenses, by which her consent was procured. I have not been able to find a single well-authenticated case, where the question was directly raised, in which it has been directly decided the other way. The anonymous case cited in the note to 1 Wheeler's Cr. Cases, 381, and referred to by Mr. Wharton (Cr. Law, § 1144) and by Mr. Bishop (2 Cr. Law, § 1080), to the effect that force is not necessary in the commission of rape, but that stratagem may supply its place, is stated as a mere rumor of a decision made at Albany by Chief Justice Thompson, and, as very properly remarked by the court in *Walter v. People*, 50 Barb. (N. Y.) 144, "loose statements of this kind are entitled to no consideration whatever." In *State v. Shepard*, 7 Conn. 54, the woman was asleep, and did not discover the fact until defendant had violated her person, and her first impression was that it was her husband. As soon as she awoke and became sensible of the situation, he sprang from the bed. The charge was for an assault with intent to commit a rape. The prisoner's counsel contended that, if there was any carnal knowledge obtained, it was a rape, and the prisoner could not be convicted of the mere assault with intent, etc., as the less offense was merged in the greater. The only question discussed was whether proof of a rape would sustain an indictment for an attempt to commit it; and, as very properly remarked by the counsel for plaintiff in error in the case before us, the counsel for the prisoner in that case overlooked a good defense in the attempt to maintain a frivolous one. The case of *Regina v. Stanton*, 1 C. & K. 415, has been sometimes cited as sustaining nearly the same doctrine as that cited from the note to Wheeler's Cr. Cases. But it was the case of an indictment for an assault with intent to commit a rape, where the prisoner, a physician, had obtained access to the person of the woman under pretense of administering an injection, and commenced to have carnal connection with her, when she, discovering it, got up and ran out of the room. This was clearly an assault, and the only question was whether the intent existed as charged. As it did not appear that the prisoner had intended to use force in case of resistance, it was, of course, but an assault only, and was so held by the court; but when

the court say that, if that intent had appeared, it would have constituted the completed offense of rape, they express an opinion upon a question not in the case. This is not the only case in which it seems to have been obscurely shadowed forth that, when the defendant has succeeded in obtaining the connection without force, actual or threatened, and without resistance, by falsely personating the husband, the mere intent to use force, had it become necessary to accomplish his purpose, would satisfy the requirement of force involved in the definition of rape. See *Rex v. Jackson*, Russ. & Ry. C. C. 487. And a similar idea seems to have been obscurely intimated in some American cases. But, with all deference, I must be allowed to suggest whether it has not resulted from confounding two distinct offenses—the completed offense of rape, and the attempt, or an assault with the intent, to commit it. And I am compelled to say I am wholly unable to discover how the intent to resort to force in such cases, when it is not in fact either resorted to or in any manner threatened, can be at all material upon the question whether a rape has been committed, or how such intent, never brought to the notice of the woman by word or act, can satisfy the requirement of force in the legal definition of the offense; and such, I think, is the prevailing view of the English courts (see, among other cases, *Reg. v. Saunders*, 8 C. & P. 265; *Reg. v. Williams*, Id. 286; *Reg. v. Clarke*, Dears. 397; *Reg. v. Fletcher*, Law Reports, 1 Cr. Cases Reserved, 39, 14 Law T. [N. S.] 573, 12 Jur. [N. S.] 505), as well as of the American courts, though such intent would, of course, constitute a necessary and controlling element in a charge for an assault with intent to commit a rape, though in no way communicated to the intended victim.

But if we admit that the intent to resort to force, if required to accomplish the criminal purpose, in a case like the present, would, though never used or threatened, constitute the transaction a rape, this would not sustain the charge in the present case, which did not even require the existence of such intent.

The true rule as to force in cases of rape generally was recognized by this court in *People v. Valentine Cornwell* (not *Croswell v. People*, as printed in the Report) 13 Mich. 433, 87 Am. Dec. 774, where it was said that “the essence of the crime is not the fact of intercourse, but the injury and outrage to the feelings of the woman by means of the carnal knowledge effected by force.” And there being no force used or threatened in that case, but strong grounds for believing that the woman was the soliciting party, the connection was properly held not to constitute rape, though the woman was not of sound mind, and had no intelligent understanding at the time the act was committed, but was in good physical health. In cases where the woman is entirely insensible from idiocy, or from the effect of drugs administered (though the point is not here involved), it may be entirely right to hold a very slight degree of force sufficient; and that amount of force which, in such cases, would always be necessary, be-

yond what would be required with a consenting party, might, perhaps, properly be held, as it sometimes has been held, sufficient to make the transaction a rape, as suggested by my Brother Cooley in *People v. Cornwell*, *ubi supra*.

And when drugs are administered, or procured to be administered, by the criminal, for the purpose of taking away or lessening the power of resistance, and having that effect, there may be no ground for distinction between the force thus exerted by him through the agency of the drugs and that directly exerted by his hand and for the same purpose.

The only question really involved in *People v. Cornwell*, above cited, was whether, under the circumstances of that case, the defendant could be held guilty without proof of force in any form, actual, or threatened, and it was, I think, properly held by us that he could not.

If the statute, or the definition of rape, did not contain the words "by force," or "forcibly," doubtless a consent procured by such fraud as that referred to might be treated as no consent; but the idea of force cannot be thus left out and ignored, nor can such fraud be allowed to supply its place, though it would doubtless supply and satisfy all the other terms of the definition, and, so far as the intimation in question is to be understood as going further and dispensing with all idea of force, it must be understood as an intimation of the court of what, in their opinion, the law ought to be, rather than what it is. And, upon abstract principles of right and wrong, a sexual connection obtained by falsely and fraudulently personating the husband of a woman, or by a physician fraudulently inducing a female patient to believe such connection essential to a course of medical treatment, must be considered nearly, if not quite, as criminal and prejudicial to society as when obtained by force or any apprehension of violence; and it might, and in my opinion would, be judicious for the Legislature to make some provision for punishment in cases of this kind. But it is not for the judiciary to legislate, by straining the existing criminal law to bring such cases within it.^a

For the reasons given, I think the judgment of the recorder's court should be reversed, and a new trial awarded.

And, with reference to a new trial, it is proper for the guidance of the recorder's court to consider the nature of the evidence set forth in the record, and which will probably appear upon the new trial, and to determine what charge the state of facts would warrant, or whether there was anything in the evidence which would authorize the jury to find that the carnal connection was obtained "by force and against the will" of the party injured.

^a Carnal intercourse obtained by personating the husband has been made rape by statute in England and in some states. See St. 48 & 49 Vict. c. 69, § 4; *Mooney v. State*, 29 Tex. App. 257, 15 S. W. 724 (1890); *State v. Williams*, 128 N. C. 573, 37 S. E. 952 (1901). The same result has been arrived at, without special enactment, by the Irish Court for Crown Cases Reserved, in *Reg. v. Dee*, 15 Cox, C. C. 579 (1884).

see the recorder

We think it is well and properly settled that the term "by force" does not necessarily imply the positive exertion of actual physical force in the act of compelling submission of the female to the sexual connection, but that force or violence threatened as the result of noncompliance, and for the purpose of preventing resistance or extorting consent, if it be such as to create a real apprehension of dangerous consequences, or great bodily harm, or such as in any manner to overpower the mind of the victim, so that she dare not resist, is, and upon all sound principles must be, regarded, for this purpose, as in all respects equivalent to force actually exerted for the same purpose. See *Reg. v. Hallett*, 9 C. & P. 748; *Reg. v. Day*, Id. 722; *Wright v. State*, 4 Humph. (Tenn.) 194; *Pleasant v. State*, 8 Eng. 360. And see *Strang v. People*, 24 Mich. 1. Nor, as appears by the case last cited, need the threats be of force to be used in accomplishing the act, as in that case the principal threat was that, if she refused, he would take her away where she could never get back. In fact, we think the terms of the statute in reference to force are satisfied by any sexual intercourse to which the woman may have been induced to yield only through the constraint produced by the fear of great bodily harm, or danger to life or limb, which the prisoner has, for the purpose of overcoming her will, caused her to apprehend as the consequence of her refusal, and without which she would not have yielded.

It remains only to apply these principles to the present case.

Considering the way and the purpose for which the girl had been placed by her father under the care and treatment of the defendant as her physician, the evidence had a tendency to show, and the jury might properly have found, that the girl was induced by the defendant to submit to the sexual intercourse with him from the fear and under the apprehension, falsely and fraudulently inspired by the defendant for the purpose of overcoming her opposition, that, if she did not yield to such intercourse, he intended to, and would, use instruments "for the purpose of enlarging the parts," and that such operation with instruments would be likely to kill her. And if the jury should so find—with or without the other facts submitted to them by the charge given—and that she would not otherwise have yielded, it would be their duty to find the defendant guilty of the crime charged.

The judgment must be reversed, and a new trial awarded.

CAMPBELL, J., concurred.

COOLEY, J. As my Brethren are agreed in this case, I concur in the result, while not fully assenting to all that is expressed in the opinion.

GRAVES, J., did not sit in this case.*

* Compare *Pomeroy v. State*, 94 Ind. 96 (1883).

REGINA v. FLATTERY.

(Court for Crown Cases Reserved, 1877. 2 Q. B. Div. 410.)

KELLY, C. B.¹ I think this conviction ought to be affirmed. Mr. Lockwood has ably argued that there was consent on the part of the prosecutrix, and therefore no rape. But, on the case as stated, it is plain that the girl only submitted to the plaintiff's touching her person in consequence of the fraud and false pretenses of the prisoner, and that the only thing she consented to was the performance of a surgical operation. Up to the time when she and the prisoner went into the room alone, it is clearly found on the case that the only thing contemplated either by the girl or her mother was the operation which had been advised. Sexual connection was never thought of by either

¹ The statement of facts and the concurring opinions of Mellor, Denman and Field, J.J., and Huddleston, B., are omitted.

"The request in substance is as follows: That, inasmuch as nonconsent is to be proved by the resistance made, therefore, if the resistance falls short of the extremest limit that could have been made, the deficiency necessarily shows consent, and should be so charged as matter of law. The fallacy lies in the assumption that the deficiency in such cases necessarily shows consent. If the failure to make extreme resistance was intentional, in order that the assailant might accomplish his purpose, it would show consent; but without such intent it shows nothing important whatsoever. The whole question is one of fact, and the court committed no error in so leaving it to the jury." Park, C. J., in *State v. Shields*, 45 Conn. 256 (1877).

At common law a boy under 14 years of age is conclusively presumed to be physically incapable of committing rape. *Reg. v. Waite*, L. R. 2 Q. B. 600 (1892); *State v. Handy*, 4 Har. (Del.) 566 (1845); *State v. Pugh*, 52 N. C. 61 (1859); *Foster v. Commonwealth*, 96 Va. 306, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. Rep. 846 (1898); *Chism v. State*, 42 Fla. 232, 28 South. 399 (1900). In some jurisdictions it is held that the presumption of incapacity may be rebutted. *People v. Randolph*, 2 Parker, Cr. R. (N. Y.) 174 (1855); *Hiltabiddle v. State*, 35 Ohio St. 52, 35 Am. Rep. 592 (1878); *Wagoner v. State*, 5 Lea (Tenn.) 252, 40 Am. Rep. 36 (1880); *Heilman v. Commonwealth*, 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207 (1886); *Gordon v. State*, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189 (1893). In Louisiana there is no presumption as to physical capacity. *State v. Jones*, 39 La. Ann. 935, 3 South. 57 (1887).

On an indictment under a statute providing: "If any person shall unlawfully and carnally know any woman child under the age of fourteen years, every such unlawful and carnal knowledge shall be felony, and the offender thereof shall suffer as for rape"—it was held that no presumption of incapacity to commit the offense arose from the fact that the defendant was under 14 years of age. *State v. Coleman*, 54 S. C. 162, 31 S. E. 866 (1899). Cf. *McKinny v. State*, 29 Fla. 565, 10 South. 732, 30 Am. St. Rep. 140 (1892).

Penetration alone, force and nonconsent being proven, is sufficient both by the early common law (see 1 East, P. C. 436; *Pennsylvania v. Sullivan*, Add. [Pa.] 143 [1793]; *Comstock v. State*, 14 Neb. 205, 15 N. W. 355 [1883]; contra, *Blackburn v. State*, 22 Ohio St. 102 [1871]), and by statute in England and most states (see 24 & 25 Viet. c. 100, § 63; *Waller v. State*, 40 Ala. 325 [1867]; *Ellis v. State*, 25 Fla. 702, 6 South. 768 [1889]; *Taylor v. State*, 111 Ind. 279, 12 N. E. 400 [1887]; *State v. Hargrave*, 65 N. C. 466 [1871]; *People v. Crowley*, 102 N. Y. 234, 6 N. E. 384 [1886]).

The crime of rape is not committed if the woman consent after the assault, but before penetration. *Reg. v. Hallet*, 9 C. & P. 748 (1841); *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355 (1861); *State v. Cunningham*, 100 Mo. 382, 12 S. W. 376 (1899). Otherwise, if she consent only after penetration. *State v. Welch*, 101 Mo. 179, 89 S. W. 945 (1905).

of them. And after she was in the room alone with the prisoner, what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation. In other words, she submitted to a surgical operation, and nothing else. It is said, however, that having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know no ground in law for such a proposition; and, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument. The case is, therefore, not within the authority of those cases which have decided—decisions which I regret—that, where a man by fraud induces a woman to submit to sexual connection, it is not rape.

Conviction affirmed.

STATE v. HAINES.

(Supreme Court of Louisiana, 1899. 51 La. Ann. 731, 25 South. 372, 44 L. R. A. 837.)

BLANCHARD, J. The case stands thus: (1) Thibodeaux exonerated from the charge by the verdict of not guilty as to him. (2) Haines declared, by the verdict of guilty as to him, to have committed the crime of rape upon Rose Moreaux. (3) Rose Moreaux was, at the time of the act, the wife of Haines. We are constrained to hold that this conviction cannot stand. The case as to Haines fell with the acquittal of Thibodeaux. It would be different if Haines had forced Thibodeaux by threats and violence, against his will and consent, to have sexual intercourse with the wife, who, herself, through menace and coercion exerted on the part of her husband, had been forced to yield. In such case, the husband alone might well be found guilty of the crime, and his unwilling instrument of its accomplishment acquitted.¹

¹ Part of this case is omitted.

"We are aware of no case holding that the husband can be guilty of the offense when he himself is the actual party to the intercourse." Davidson, P. J., in *Frazier v. State* (Tex. Cr. App.) 86 S. W. 754 (1905)

CHAPTER XII.

HOMICIDE.

SECTION 1.—GENERAL PRINCIPLES.

I. THE SEVERAL KINDS OF HOMICIDE.

Homicide is the killing of a man done by a man, for if it be done by an ox, a dog, or other thing, it is not properly termed homicide. For homicide is so termed from "homine" and "cædo," as it were the slaying of a man.

Bracton, f. 120 b.

Homicide, properly so called, is either against a man's own life or that of another. * * *

As to the first point, viz.: In what case a man shall be said to be *felo de se*. * * * Our laws have always had such an abhorrence of this crime, that not only he who kills himself with a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such attempt unwillingly kills himself, shall be adjudged in the eye of the law a *felo de se*.

1 Hawkins, P. C. c. 9.

Homicide against the life of another amounts to felony, or does not. That which amounts not to felony is either justifiable, and causes no forfeiture at all, or excusable, and causes the forfeiture of the party's goods.

Of justifiable homicide I shall premise these general rules:

First. It must be owing to some unavoidable necessity to which the person who kills another must be reduced without any manner of fault in himself.

Secondly. There must be no malice colored under pretense of necessity; for wherever a person who kills another acts in truth upon malice, and takes occasion from the appearance of necessity, to execute his own private revenge, he is guilty of murder. * * *

Justifiable homicide is either of a public or of a private nature. Justifiable homicide of a public nature is such as is occasioned by the due execution or advancement of public justice. That of a private nature is such as happens in the just defense of a man's person, house, or goods.

Id. c. 10.

Excusable homicide is either *per infortuniam*, or *se defendendo*.
* * *

Homicide *per infortuniam*, or by misadventure, is where a man in doing a lawful act, without any intent of hurt, unfortunately chances to kill another. * * *

Homicide *se defendendo* seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the persons by whom he is reduced to such an inevitable necessity. * * *

Thus far of each kind of excusable homicide distinctly considered—and now I am to consider those properties wherein they both agree.

And first, it seems clear that neither of these homicides are felonies, because they are not accompanied with a felonious intent, which is necessary in every felony.¹

And from hence it seems plainly to follow, that they were never punishable with loss of life; and the same also further appears from the writ *odio et atia*, by virtue whereof, if any person committed for killing another were found guilty of either of these homicides, and no other crime, he might be bailed; and indeed it seems to be against natural justice to condemn a man to death for what is owing rather to his misfortune than his fault. * * *

Thirdly, it is also agreed, that no one can excuse the killing another, by setting forth in a special plea that he did it by misadventure, or *se defendendo*, but that he must plead not guilty, and give the special matter in evidence. And that whenever a person is found guilty of such homicide * * * he shall be discharged out of prison upon bail, and forfeit his goods, but that upon removing the record by *certiorari* into chancery, he shall have his pardon of course, without staying for any warrant from the king to that purpose, as shall be more fully shown in the second book.

Id. c. 11.

II. THE SUBJECT OF HOMICIDE.

If there be some one, who has struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the *fœtus* be already formed and animated, and particularly if it be animated, he commits homicide.

Bracton, f. 120 b.

If a woman be quick with child and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her

¹ Roger of Stainton was arrested because in throwing a stone he by misadventure killed a girl. And it is testified that this was not by felony. And this was shown to the king, and the king moved by pity pardoned him the death. So let him be set free. See Sel. P. C. (Sel. Soc.) pl. 114 (1214).

body, and she is delivered of a dead child, this is a great misprision, and no murder; but if the child be born alive, and dieth of the potion, battery or other cause, this is murder;¹ for in law it is accounted a reasonable creature, in *rerum natura* when it is born alive.² And the book in 1 Edw. III. was never holden for law. And 3 Ass. p. 2, is but a repetition of that case. And so horrible an offense should not go unpunished * * * and herewith agreeth Fleta; and herein the law is grounded upon the law of God. * * * If a man counsel a woman to kill the child within her womb, when it shall be born, and after she is delivered of the child, she killeth it, the counsellor is an accessory to the murder, and yet at the time of the commandment, or counsel, no murder could be committed of the child in *utero matris*; the reason of which case proveth well the other case.

3 Coke, Inst. 50.

REX v. BRAIN.

(Oxford Assizes, 1834. 6 Car. & P. 349.)

Murder. The prisoner was indicted for the murder of her male bastard child.

It appeared that the prisoner had been delivered of a child at Sandford Ferry, and that the body of the child was afterwards found in the water, about 15 feet from the lock gate, near the ferry house; but it was proved by two surgeons, Mr. Box and Mr. Hester, that the child had never breathed.

PARK, J. (in summing-up). A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive, and yet do not breathe for some time after their birth. But you must be satisfied that the child was wholly born into the world at the time it was killed, or you ought not to find the prisoner guilty of murder. This is not only my opinion, but the law was so laid down in a case as strong as this, by a very learned Judge (Mr. Justice Littledale) at the Old Bailey. [His Lordship read the case of *Rex v. Poulton*, 5 Car. & P. 329.]

Verdict—Not guilty of murder, but guilty of concealment.

¹ Accord: *Clarke v. State*, 117 Ala. 1, 23 South. 671, 67 Am. St. Rep. 157 (1898).

² Lord Coke cites the above quotation from Bracton as authority for this statement; *sed qu.* Blackstone says: "To kill a child in its mother's womb is now no murder, but a great misprision." And in *Sel. P. C. (Sel. Soc.)* pl. 26, is an appeal in the year 1202 for beating a woman so as to kill the child in her womb.

"The conclusion is fairly deducible from certain portions of the testimony that an attempt was made to kill the girl by the administration of cocaine while in *cinchmati*, and that this was done by the defendant or at his instance, but that she was not thereby killed. It is to be remembered that,

III. THE ACT CAUSING DEATH.

Not only he who by a wound or blow, or by poisoning, strangling or famishing, etc., directly causes another's death, but also in many cases he who by wilfully and deliberately doing a thing which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him.

And such was the case of him who carried his sick father, against his will, in a cold frosty season, from one town to another, by reason whereof he died. Pult. 122.

Such also was the case of the harlot, who being delivered of a child, left it in an orchard, covered only with leaves, in which condition it was struck by a kite, and died thereof. Crom. 24.

And in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress or imprisonment compels a man to accuse an innocent person, who on his evidence is condemned and executed; or where one incites a madman to kill himself or another; or where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another, who dies thereof. Plowd. 474. Also he who wilfully neglects to prevent a mischief, which he may and ought to provide against, is, as some have said, in judgment of the law, the actual cause of the damage which ensues; and, therefore if a man have an ox or a horse, which he knows to be mischievous, by being used to gore or strike at those who come near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted as having himself feloniously killed him, and this is agreeable to the Mosaical law.

However, it is agreed by all, such a person is certainly guilty of a very gross misdemeanor.

Also it is agreed, that no person shall be adjudged by any act whatever to kill another who doth not die thereof within a year and a day

according to the testimony of Jackson, he did not see the girl in life after Wednesday, and, according to Walling, he did not see her after that day; but the proof conduces to show that they were both with her Friday night, when she was in the cab, and that they brought her over to Campbell county. If she was then dead as might be supposed from her making no outcry, a verdict of guilty could not have been rendered; but if she was then alive, though appearing to be dead, and by the cutting of her throat she was killed while in Campbell county, then the jury might find a verdict of guilty, although the cutting off of the head was merely for the purpose of destroying the chances for identification or for any other purpose. At least the instruction does not authorize a verdict of conviction unless Jackson is shown to have cut off the head of his victim in Campbell county, and while she was in fact alive; and if he did this he was guilty of murder, though believing her already dead, if the act succeeded and was but a part of the felonious attempt to kill her in Cincinnati." Hazelrigg, J., in *Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336 (1896).

after; in the computation whereof, the whole day on which the hurt was done shall be reckoned the first.

But if a person hurt by another die thereof within a year and a day, it is no excuse for the other that he might have recovered if he had not neglected to take care of himself.

1 Hawkins, P. C. c. 13.

GORE'S CASE.

(King's Bench, 1611. 9 Coke, 81.)

Before Fleming, Chief Justice, and Tanfield, Chief Baron, Justices of Assize, this case happened in their Western circuit. Agnes, the daughter of Roper, married one Gore. Gore fell sick. Roper, the father, in good will to the said Gore, his son-in-law, went to one Dr. Gray, a physician, for his advice, who made a receipt directed to one Martin, his apothecary, for an electuary to be made, which the said Martin did, and sent it to the said Gore. Agnes, the wife of Gore, secretly mixed ratsbane with the electuary, to the intent therewith to poison her husband, and afterwards, 18 Maii, she gave part of it to her husband, who eat thereof and immediately became grievously sick; the same day Roper, the father, eat of it, and immediately also became sick, 19 Maii C. eat part of it and he likewise fell sick; but they all recovered and yet are alive. The said Roper, observing the operation of the said electuary, carried the said box with said electuary, 21 Maii, to the said Gray, the physician, and informed him of the said accidents, who sent for the said Martin, the apothecary, and asked him if he had made the said electuary according to his direction, who answered that he had, in all things but in one, which he had not in his shop, but put in another thing of the same operation, which the said Doctor Gray well approved of, whereupon Martin, the apothecary, said, "To the end you may know that I have not put anything in it, which I myself will not eat, I will here before you eat part of it," and thereupon Martin took the box, and with his knife mingled and stirred together the said electuary, and took and eat part of it, of which he died the 22d day of May following. The question was, if upon all this matter Agnes had committed murder. And this case was delivered in writing to all the Judges of England to have their opinions in the case. And the doubt was, because Martin himself of his own head, without incitation or procurement of any, not only eat of the said electuary, but he himself mingled and stirred it together, which mixing and stirring had so incorporated the poison with the electuary, that it made the operation more forcible than the mixture which the said Agnes had made; for, notwithstanding the mixture which Agnes had made, those who eat of it were sick, but yet alive, but the mixture which Martin has made by mingling and stirring

it with his knife, made the operation of the poison more forcible, and was the occasion of his death. And if this circumstance would make a difference between this case and Saunders' Case in Plow. Com. 474, was the question.

And it was resolved by all the Judges that the said Agnes was guilty of the murder of the said Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband, with the event which thence ensued; sc. the death of the said Martin; for the putting of the poison into the electuary is the occasion and cause; and the poisoning and death of the said Martin is the event, quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt, and the stirring of the electuary by Martin with his knife without the putting in of the poison by Agnes could not have been the cause of his death.

And it was also resolved, that if A. puts poison into a pot of wine, etc., to the intent to poison B. and sets it in a place where he supposes B. will come and drink of it, and by accident C. (to whom A. has no malice) comes, and of his own head takes the pot and drinks of it, of which poison he dies, it is murder in A., for the law couples the event with the intention, and the end with the cause; and in the same case if C., thinking that sugar is in the wine, stirs it with a knife, and drinks of it, it will not alter the case, for the king by reason of the putting in of the poison with a murderous intent, has lost a subject; and therefore in law he who so put in the poison with an ill and felonious intent, shall answer for it. But if one prepare ratsbane to kill rats and mice, or other vermin, and leaves it in certain places to that purpose, and with no ill intent, and one finding it eats of it, it is not felony, because he who prepares the poison has no ill or felonious intent; but when one prepares poison with a felonious intent to kill any reasonable creature, whatsoever reasonable creature is thereby killed, he who has the ill and felonious intent shall be punished for it, for he is as great an offender, as if his intent against the other person had taken effect. And if the law should not be such, this horrible and heinous offense would be unpunished, which would be mischievous and a great defect in the law.

REX v. REW.

(Newgate Sessions, 1662. Kelyng, 26.)

Edward Rew was indicted for killing Nathaniel Rew, his brother, and upon the evidence it was resolved that if one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according as the case is in the person who

gave the wounds, because if the wounds had not been, the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them.¹

REX v. HUGGINS.

(King's Bench, 1730. 2 Ld. Raym. 1574.)

This was a special verdict found at the Old Bailey on an indictment of murder against James Barnes and John Huggins. The jury found that Huggins was warden of the prison of the Fleet, that Thomas Gibbons was deputy of Huggins and that Barnes was the servant of Gibbons and had the care of the prisoners committed to the said prison. They further found that Edward Arne having been committed to the said prison, was, without his consent, placed by said Barnes for forty days in a room of the prison newly built, the walls of which were very damp. That said room was situate over the common sewer of the prison and near the place where the refuse of the prison was usually put, by reason whereof the room was very unwholesome and dangerous to the life of any person detained therein.

That the said Arne was, without his consent, detained by the said Barnes in the said room for forty days without fire, or chamber pot, close-stool or any such utensil, all of which the said Barnes well knew; and that by the said duress the said Arne languished and died.²

The record, the indictment and special verdict being removed into the King's Bench and argued before all the twelve judges,

The Lord Chief Justice delivered the opinion of the judges.

In this case two questions have been made: (1) What crime the facts found upon Barnes in the special verdict will amount to? (2) Whether the prisoner at the bar is found guilty of the same offence with Barnes?

1. As to the first question, it is very plain, that the facts found upon Barnes do amount to murder in him. Murder may be committed without any stroke. The law has not confined the offence to any particular circumstances or manner of killing; but there are as many ways to commit murder, as there are to destroy a man, provided the act be done with malice, either express or implied. Hale P. C., 46, 3 Inst. 52.

¹ Accord: Refusing to allow amputation, *Hopkins v. U. S.*, 4 App. D. C. 420 (1894); the refusal not being such gross neglect as to bring the case within articles 652, 653, of the Penal Code, *Franklin v. State*, 41 Tex. Cr. R. 21, 51 S. W. 951 (1899).

² Part of this case is omitted.

REGINA v. TOWERS.

(Court of Criminal Appeals, 1874. 12 Cox, Cr. Cas. 530.)

Wilson Towers was charged with the manslaughter of John Hetherington, at Castlesowerby, on the 6th of September, 1873.

The prisoner, who had been drinking on the 4th of August, went into a public house at New Yeat, near Castlesowerby, kept by the mother of the deceased, and there saw a girl called Fanny Glaister nursing the deceased child, who was then only about four months and a half old, having been born on the 20th of March, 1873. The prisoner, who appeared to have had some grievance against Fanny Glaister about her hitting one of his children, immediately on entering the public house went straight up to where she was, took her by the hair of the head, and hit her. She screamed loudly, and this so frightened the infant that it became black in the face, and ever since that day, up to its death, it had convulsions and was ailing generally from a shock to the nervous system. The child was previously a very healthy one.¹

DENMAN, J., in summing up, said: It was a very unusual case, and it was very unusual indeed to find a case in which they got practically no assistance from previously decided cases. There was no offense known to our law so various in its circumstances, and so various in the considerations applicable to it, as that of manslaughter. It might be that in this case, unusual as it was, on the principle of common law, manslaughter had been committed by the prisoner. The prisoner committed an assault on the girl, which is an unlawful act, and if that act, in their judgment, caused the death of the child—i. e., that the child would not have died but for that assault—they might find the prisoner guilty of manslaughter. He called their attention to some considerations that bore some analogy to this case. This was one of the new cases to which they had to apply old principles of law. It was a great advantage that it was to be settled by a jury, and not by a judge. If he were to say, as a conclusion of law, that murder could not have been caused by such an act as this, he might have been laying down a dangerous precedent for the future; for, to commit a murder, a man might do the very same thing this man had done. They could not commit murder upon a grown-up person by using language so strong, or so violent, as to cause that person to die. Therefore mere intimidation, causing a person to die from fright by working upon his fancy, was not murder.

But there were cases in which intimidations had been held to be murder. If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them

¹ Part of the opinion is omitted.

and tumble over a precipice to avoid them, then murder would have been committed. Then did, or did not, this principle of law apply to the case of a child of such tender years as the child in question? For the purposes of the case he would assume that it did not; for the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question, which would be for them to decide, whether this death was directly the result of the prisoner's unlawful act—whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that upon all the circumstances of the case. After referring to the supposition that the convulsions were brought on owing to the child teething, he said that, even though the teething might have had something to do with it, yet if the man's act brought on the convulsions, or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter. If, therefore, the jury thought that the act of the prisoner in assaulting the girl was entirely unconnected with it, that the death was not caused by it, but by a combination of circumstances, it would be accidental death, and not manslaughter.²

Not guilty.

REX v. HICKMAN.

(Shrewsbury Assizes, 1831. 5 Car. & P. 151.)

Manslaughter. The first count of the indictment stated the death of the deceased to have been by blows. The second count stated, in substance, that the deceased, John Randell, was riding on horseback, and that the prisoner made an assault upon him and struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack upon him, which would have endangered his life, spurred on his horse, whereby it became frightened, and threw the deceased off, giving him a mortal fracture, etc.

There was no evidence to support the first count, and it appeared that the prisoner and the deceased, being both on horseback, had a quarrel, and that the prisoner struck the deceased with a small stick, and that he rode away along the Holyhead road, the prisoner riding after him, and that, on the deceased spurring his horse, which was a young one, the horse winced and threw him.

Mr. Justice PARK. I think the second count is sufficiently proved. The death of this individual was clearly caused by the frightening of his horse. In indictments for robbery, terror and force are always both stated, but it is sufficient to prove one of them. However, in this count, it is not stated that the deceased died of any blow. In the case of *Rex v. Evans*, 1 Russ., C. & M. 425, it was held that

² See, also, *Cox v. People*, 80 N. Y. 500 (1880).

if the death of the deceased, who was the wife of the prisoner, was partly occasioned by blows and partly by a fall out of a window, the wife jumping out at the window from a well-grounded apprehension of further violence that would have endangered her life, the prisoner was as much answerable for the consequence of the fall, as if he had thrown her out at the window himself.

Verdict—Guilty.¹

REGINA v. WEST.

(Nottingham Assizes, 1848. 2 Car. & K. 784.)

MAULE, J., in summing up, said: The prisoner is charged with murder; and the means stated are that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion, and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. This, no doubt, is an unusual mode of committing murder, and some doubt has been suggested by the prisoner's counsel whether the prisoner's conduct amounts to that offense; but I am of opinion (and I direct you in point of law) that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder. The evidence seems to show clearly that the death of the child was occasioned by its premature birth; and if that premature delivery was brought on by the felonious act of the prisoner, then the offense is complete. His Lordship then read the evidence, and, in conclusion, said: If the child, by the felonious act of the prisoner, was brought into the world in a state in which it was more likely to die than it would have been if born in due time, and did die in consequence, the offense is murder; and the mere existence of a possibility that something might have been done to prevent the death would not render it less murder. If, therefore, you are satisfied, to the exclusion of any reasonable doubt, that the prisoner, by a felonious attempt to procure abortion, caused the child to be brought into the world, for which it was not then fitted, and that the child did die in consequence of its exposure to the external world, you will find her guilty. If you entertain a reasonable doubt as to the facts, you will, of course, find her not guilty.

Verdict—Not guilty.

¹ See, also, *Reg. v. Pitts*, 1 Car. & M. 284 (1842); *Reg. v. Halliday*, 61 L. T. Rep. 701 (1889); *Thornton v. State*, 107 Ga. 683, 33 S. E. 673 (1889). Cf. *Hendrickson v. Commonwealth*, 85 Ky. 281, 3 S. W. 166, 7 Am. St. Rep. 596 (1887).

REGINA v. GREENWOOD.

(Liverpool Assizes, 1857. 7 Cox. C. C. 404.)

The prisoner was indicted for murder and rape on a child under ten. It appeared from the evidence that the prisoner had connection with the deceased, and that it was afterwards discovered she had the venereal disease.

WIGHTMAN, J., told the jury that the malice, which constitutes murder, might be either express or implied. There was no pretense in this case that there was any malice other than what might be implied by law. There were five questions for them to consider:

First, had the prisoner connection with her?

Secondly, did she die therefrom?

Thirdly, had she the venereal disease?

Fourthly, did she die from its effects?

Fifthly, did she get it from the prisoner?

If they were of opinion that the prisoner had connection with her, and she died from its effects, then that act being, under the circumstances of this case, a felony in point of law, this would, of itself, be such malice as would justify them in finding him guilty of murder.

The jury retired, and after some time returned into court, saying that they were satisfied that he had connection and that her death resulted therefrom, but were not agreed as to finding him guilty of murder.

WIGHTMAN, J., told them that, under these circumstances, it was open to them to find the prisoner guilty of manslaughter, and that they might ignore the doctrine of constructive malice if they thought fit.

The jury found a verdict of manslaughter, and the prisoner was ordered to be kept in penal servitude for life.

REGINA v. BENNETT.

(Court for Crown Cases Reserved, 1858. Bell, 1.)

The following case was reserved by Willes, J.:

William Bennett was convicted before me at the Old Bailey, on the 18th of August, 1858, of the manslaughter of Sarah Williams.

The substantial question is whether a person who makes fireworks, contrary to St. 9 & 10 Wm. III. c. 7, is indictable for manslaughter if death be caused by a fire breaking out amongst combustibles in his possession, collected by him, and in the course of use, for the purpose of his business, but not completely made into fireworks at the time.¹

¹ Part of the statement, rendered irrelevant by the opinion of the court, is omitted.

This case was considered, on 13th November, 1858, by COCKBURN, C. J., and WIGHTMAN, WILLIAMS, and WILLES, JJ., and CHANNELL, B.

Martin appeared for the Crown, and Hardinge Giffard for the prisoner.

COCKBURN, C. J. It appears that the prisoner kept in his house a quantity of fireworks, but that circumstance alone did not cause the fire by which the death was occasioned; but, the fireworks and the combustibles kept by the defendant for the purpose of his business being in the house, the fire was caused by the negligence of the defendant's servants. Can it be contended that, under such circumstances, the defendant is criminally responsible?

Martin, for the Crown. The explosive nature of these substances kept by the defendant in such a place is to be considered; and, if the keeping of the fireworks was unlawful, the prisoner would be responsible for all the consequences of that unlawful act.

COCKBURN, C. J. The keeping of the fireworks in the house by the defendant caused the death only by the superaddition of the negligence of some one else. By the negligence of the defendant's servants the fireworks ignited, and the house, in which the deceased was, was set on fire, and death ensued. The keeping of the fireworks may be a nuisance, and if, from the unlawful act of the defendant, death had ensued as a necessary and immediate consequence, the conviction might be upheld. The keeping of the fireworks, however, did not alone cause the death. Plus that act of the defendant, there was the negligence of the defendant's servants.

WILLES, J. The fire which caused the death did not happen through any personal interference or negligence of the defendant. The keeping of the fireworks in the house was disconnected with the negligence of the defendant's servants which caused the fire.

COCKBURN, C. J. The view which we all take of the case is that the prisoner cannot be convicted upon these facts.

Hardinge Giffard, for the prisoner, was not called upon by the court.

Conviction quashed.²

REGINA v. BENGÉ.

(Nisi Prius, 1865. 4 Fost. & F. 504.)

PICOTT, B., said³ that, assuming culpable negligence on the part of the prisoner which materially contributed to the accident, it would not be material that others also by their negligence contributed to cause it. Therefore he must leave it to the jury whether there was

² Compare Reg. v. Pocock, ante, p. 131.

³ Part of this case is omitted.

negligence of the prisoner which had been the substantial cause of the accident. In summing up the case to the jury, he said their verdict must depend upon whether the death was mainly caused by the culpable negligence of the prisoner. Was the accident mainly caused by the taking up of the rails at a time when an express train was about to arrive, was that the act of the prisoner, and was it owing to culpable negligence on his part? His counsel had urged that it was not so, because the flagman and engine driver had been guilty of negligence which had contributed to cause the catastrophe; but they, in their turn, might make the same excuse, and so, if it was valid, no one could be criminally responsible at all. This would be an absurd and unreasonable conclusion, and showed that the contention of the prisoner's counsel could not be sound. Such was not the right view of the law—that, if the negligence of several persons at different times and places contributed to cause an accident, any one of them could set up that his was not the sole cause of it. It was enough against any one of them that his negligence was the substantial cause of it. Now, here the primary cause was certainly the taking up of the rails at a time when the train was about to arrive, and when it would be impossible to replace them in time to avoid the accident. And this the prisoner admitted was owing to his own mistake. Was that mistake culpable negligence, and did it mainly or substantially cause the accident? The book² was clearly and plainly printed, and must have been read carelessly to admit of such a mistake. Was it not the duty of the prisoner, who knew the fearful consequences of a mistake, to take reasonable care to be correct? And had he taken such care? Then, as to its being the main cause of the accident, it was true that the company had provided other precautions to avoid any impending catastrophe, and that these were not observed upon this occasion; but was it not owing to the prisoner's culpable negligence that the accident was impending, and, if so, did his negligence the less cause it because, if other persons had not been negligent, it might possibly have been avoided?

Verdict—Guilty.

PEOPLE v. LEWIS.

(Supreme Court of California, 1899. 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783.)

TEMPLE, J. The defendant was convicted of manslaughter, and appeals from the judgment and from an order refusing a new trial.³

Defendant and deceased were brothers-in-law, and not altogether

² The prisoner was foreman of a gang of plate layers, who had been employed to repair the rails. He had been furnished with a time book showing the precise time of the arrival of trains.

³ Part of the opinion is omitted.

friendly, although they were on speaking and visiting terms. On the morning of the homicide the deceased visited the residence of the defendant, was received in a friendly manner, but after a while an altercation arose, as a result of which defendant shot deceased in the abdomen, inflicting a wound that was necessarily mortal. Farrell fell to the ground, stunned for an instant, but soon got up and went into the house, saying: "Shoot me again; I shall die anyway." His strength soon failed him, and he was put to bed. Soon afterward, about how long does not appear, but within a very few minutes, when no other person was present except a lad of about nine years of age, nephew of the deceased and son of the defendant, the deceased procured a knife and cut his throat, inflicting a ghastly wound, from the effect of which, according to the medical evidence, he must necessarily have died in five minutes. The wound inflicted by the defendant severed the mesenteric artery, and medical witnesses testified that under the circumstances it was necessarily mortal, and death would ensue within one hour from the effects of the wound alone. Indeed, the evidence was that usually the effect of such a wound would be to cause death in less time than that, but possibly the omentum may have filled the wound, and thus, by preventing the flow of the blood from the body, have stayed its certain effect for a short period. Internal hemorrhage was still occurring, and, with other effects of the gunshot wound, produced intense pain. The medical witnesses thought that death was accelerated by the knife wound. Perhaps some of them considered it the immediate cause of death.

Now, it is contended that this is a case where one languishing from a mortal wound is killed by an intervening cause, and, therefore, deceased was not killed by Lewis. To constitute manslaughter, the defendant must have killed some one, and if, though mortally wounded by the defendant, Farrell actually died from an independent intervening cause, Lewis, at the most, could only be guilty of a felonious attempt. He was as effectually prevented from killing as he would have been if some obstacle had turned aside the bullet from its course and left Farrell unwounded. And they contend that the intervening act was the cause of death, if it shortened the life of Farrell for any period whatever.

The Attorney General does not controvert the general proposition here contended for, but argues that the wound inflicted by the defendant was the direct cause of the throat cutting, and, therefore, defendant is criminally responsible for the death. He illustrates his position by supposing a case of one dangerously wounded and whose wounds had been bandaged by a surgeon. He says: Suppose through the fever and pain consequent upon the wound the patient becomes frenzied and tears away the bandage and thus accelerates his own death. Would not the defendant be responsible for a homicide? Undoubtedly he would be, for in the case supposed the deceased died from the wound, aggravated, it is true, by the restlessness of the

deceased, but still the wound inflicted by the defendant produced death. Whether such is the case here is the question.

1. The Attorney General seems to admit a fact, which I do not concede, that the gunshot wound was not, when Farrell died, then itself directly contributory to the death. I think the jury were warranted in finding that it was. But if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible, if it was made to appear, and the jury could have found from the evidence, that the knife wound was caused by the wound inflicted by the defendant in the natural course of events. If the relation was causal, and the wounded condition of the deceased was not merely the occasion upon which another cause intervened, not produced by the first wound or related to it in other than a casual way, then defendant is guilty of a homicide. But, if the wounded condition only afforded an opportunity for another unconnected person to kill, defendant would not be guilty of a homicide, even though he had inflicted a mortal wound. In such case, I think, it would be true that the defendant was thus prevented from killing.

The case, considered under this view, is further complicated from the fact that it is impossible to determine whether deceased was induced to cut his throat through pain produced by the wound. May it not have been from remorse, or from a desire to shield his brother-in-law? In either case the causal relation between the knife wound and the gunshot wound would seem to be the same. In either case, if defendant had not shot the deceased, the knife wound would not have been inflicted.

Suppose one assaults and wounds another, intending to take life, but the wound, though painful, is not even dangerous, and the wounded man knows that it is not mortal, and yet takes his own life to escape pain, would it not be suicide only? Yet, the wound inflicted by the assailant would have the same relation to death which the original wound in this case has to the knife wound. The wound induced the suicide, but the wound was not, in the usual course of things, the cause of the suicide.

Though no case altogether like this has been found, yet, as was to have been expected, the general subject has often been considered. In 1 Hale's Pleas of the Crown, 428, the law is stated. So far as material here, his views may be thus summarized: (1) If one gives another a dangerous wound, which might by very skillful treatment be cured, and is not, it is a case of homicide. (2) If one inflicts a dangerous wound, and the man dies from the treatment, "if it can clearly appear that the medicine and not the wound was the cause of the death, it seems it is not homicide; but then it must appear clearly and certainly to be so." (3) If one receives a wound, not in itself mortal, and fever or gangrene sets in because of improper treatment or unruly conduct of the patient, and death ensues, it is homicide; "for that wound, though it was not the immediate cause of his death,

yet it was the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, is *causa causati*." (4) One who hastens the death of a person languishing with a mortal disease is guilty of a nomicide; for the death is not merely by a visitation of Providence, but the hurt hastens it and the wrongdoer cannot thus apportion the responsibility, *et cetera*. It would make no difference, I presume, if the person killed was languishing from a mortal wound, rather than from an ordinary disease.

In *State v. Scates*, 50 N. C. 420, a child was found dead, badly burned, and with a wound from a blow on the head. The burning was admitted by defendant, but the blow was not, and it was not proven who inflicted it. The medical witness thought the burning was the primary cause of death, but the blow may have hastened it. The jury was told that if it was doubtful which was the immediate cause of death they must acquit, but if they found that the burning was the primary cause of death and the blow only hastened it they could convict.

The case was reversed, the appellate court holding that the blow might have been the independent act of another, and, if it hastened the death, it, and not the burning, was the cause of death.

In *Bush v. Commonwealth*, 78 Ky. 268, the deceased received a wound not necessarily mortal, and, in consequence, was taken to a hospital, where she took scarlet fever from a nurse and died of the fever. The court said: "When the disease is a consequence of the wound, although the proximate cause of the death, the person inflicting the wound is guilty, because the death can be traced as a result naturally flowing from the wound and coming in the natural order of things; but when there is a supervening cause, not naturally intervening by reason of the wound, the death is by visitation of Providence, and not from the act of the party inflicting the wound. * * * If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility."

The last case, in my opinion, so far as it goes, correctly states the law. The facts of this case do not bring it strictly within any of the propositions found in *Hale's Pleas of the Crown*. The second and third propositions both predicate a wound not necessarily mortal. What the law would have been in the second case, had the wound been mortal and the applications had hastened the death, is not stated. It seems to me, however, the case of a person already languishing from a mortal wound is precisely that of one suffering from a mortal disease. Certainly the willful and unlawful killing of such a person would be a felony, and it cannot be true that the first offender and the last can each be guilty of murdering the same man—if they had no connection with each other, and both wounds were not actively operating to produce death when it occurred.

But why is it that one who inflicts a wound not mortal is guilty

of a homicide, if through misconduct of the patient or unskillful treatment gangrene or fever sets in, producing a fatal termination, when, if it can be clearly made to appear that the medicine and not the wound was the cause of the death, he is not guilty of a homicide? In each case if the wound had not been, the treatment would not have been, and the man would not then have died. In each case the wound occasioned the treatment which caused or contributed to the death. The reason, I think, is found in the words advisedly used in the last sentence. In the one case the treatment caused the death, and in the other it merely contributed to it. In one case the treatment aggravated the wound, but the wound thus aggravated produced death. In the other the wound, though the occasion of the treatment did not contribute to the death, which occurred without any present contribution to the natural effect of the medicine from the wound. Take, for instance, the giving of a dose of morphine, by mistake, sufficient to end life at once. In such case it is as obvious that the treatment produced death as it would have been had the physician cut off his patient's head. But see *People v. Cook*, 39 Mich. 236, 33 Am. Rep. 380. In this case it appears that defendant had inflicted a dangerous wound, but it was contended by the defense that death was caused by an overdose of morphine. Defendant asked an instruction as follows: "If the jury believe that the injury inflicted by the prisoner would have been fatal, but if death was actually produced by morphine poisoning, they must acquit." The instruction was refused, but the jury were told that if the wound was not in itself mortal, and death was caused solely by the morphine, they must acquit. The action of the trial court was sustained, on the ground that a mortal wound had been given which necessitated medical treatment, that the physicians were competent and acted in good faith, and that it was not made clearly to appear that the morphine solely produced death, and that the wound did not at all contribute to the death at that time. Under the authorities this was equivalent to the finding that the wound did not contribute to the death.

This case differs from that in this: That here the intervening cause, which it is alleged hastened death, was not medical treatment designed to be helpful, and which the deceased was compelled to procure because of the wound, but was an act intended to produce death and did not result from the first wound in the natural course of events. But we have reached the conclusion by a course of argument unnecessarily prolix, except from a desire to fully consider the earnest and able argument of the defendant, that the test is—or at least one test—whether, when the death occurred, the wound inflicted by the defendant did contribute to the event. If it did, although other independent causes also contributed, the causal relation between the unlawful acts of the defendant and the death has been made out. Here, when the throat was cut, Farrell was not merely languishing from a mortal wound. He was actually dying—and after the throat was

cut he continued to languish from both wounds. Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event. If the throat cutting had been by a third person, unconnected with the defendant, he might be guilty; for, although a man cannot be killed twice, two persons, acting independently, may contribute to his death, and each be guilty of a homicide. A person dying is still in life, and may be killed; but, if he is dying from a wound given by another, both may properly be said to have contributed to his death.

The court refused to instruct the jury as follows: "If you believe from the evidence that it is impossible to tell whether Will Farrell died from the wound in the throat or the wound in the abdomen, you are bound to acquit." The instruction was properly refused. It assumed that death must have resulted wholly from one wound or the other, and ignored the proposition that both might have contributed, as the jury could have found from the evidence.

The judgment is affirmed.

McFARLAND, and HENSHAW, JJ., concurred.

Hearing in banc denied.

TAYLOR v. STATE.

(Court of Criminal Appeals of Texas, 1900. 41 Tex. Cr. R. 564, 55 S. W. 961.,

HENDERSON, J.¹ Appellant objected to that portion of the charge of the court which instructed the jury, in effect, that if defendant and those with him took deceased, Johnson, in custody, and compelled him to go against his will from the engine to the express car, and that same was a place of danger, where deceased's life was exposed, and that while said Johnson was in such place of danger, and they were attempting to rob the train, and using him for that purpose, if Buchanan, in resistance to the perpetration of said attempt-

"If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice. It is certain that the second person could be convicted of murder if he killed with malice aforethought, and to convict the first would be assuming that he had also killed the same person at another time." Battle, J., in *State v. Scates*, 50 N. C. 423 (1858).

See also *People v. Ah Fat*, 48 Cal. 61 (1874).

"Referring to the allegation, relating to the second ground of defense, that a lost drainage tube (inserted by the surgeons in attendance to relieve their patient, etc.) found its way into the spinal canal and caused the death of John Schwindt, the learned judge said: 'But suppose it did; the prisoner cannot escape by showing that death was the result of an accident occurring in an operation which his felonious act made necessary. There is no pretense that the drainage tubes were not required, or that they were improperly placed.' This was clearly correct." Per Curiam, in *Commonwealth v. Eisenhower*, 181 Pa. 476, 37 Atl. 521, 59 Am. St. Rep. 670 (1897).

¹ Part of the opinion is omitted.

ed robbery, in shooting at the robbers, innocently shot and killed Lee Johnson, not intending to kill him, but intending to kill the parties attempting to perpetrate the robbery, defendant and those with him would be as guilty as if they themselves had shot and killed said Lee Johnson. Appellant objected to this charge of the court on the grounds: (1) That the evidence did not show that defendant and those acting with him placed Johnson in front of the express car to get him shot, but to prevent a shooting; (2) because in front of the express car was not more dangerous than at any other place along the line; (3) because said charge forced the jury to convict, even if they believed that Buchanan killed Johnson, and did not allow them to pass upon that question; (4) it destroyed appellant's innocence, and forced a conviction even if Johnson came to his death by any outside, independent, and unexpected force, by a mere passenger, when he was under no obligation to shoot; (5) it does not give defendant the benefit of a reasonable doubt as to the existence of facts that would not render him guilty if Buchanan killed Johnson; (6) it does not submit the law of murder in the second degree. This presents a novel question, and has never, so far as we are advised, been passed upon in this state; nor do we find an analogous case reported elsewhere. Appellant cites us to two cases in support of his contention: *Commonwealth v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705; *Butler v. People*, 125 Ill. 641, 18 N. E. 338, 1 L. R. A. 211, 8 Am. St. Rep. 423. Both of these were cases of riot, where certain officers (in attempting to quell the riot), in shooting, accidentally killed bystanders who were not engaged in the riot. The prosecution attempted to hold the rioters responsible for the killing by the officers who were opposed to them. The court refused to hold the rioters responsible for the killing by the officers, on the ground that the act was not done by the rioters, nor in pursuance of any design by them; that the sheriff was not acting with them, and they were in no wise responsible for his acts. The court, after citing authorities, say: "That no person can be held responsible for a homicide unless the act was either actually or constructively committed by him; and, in order to be his act, it must be committed by his hand, or by some one acting in concert with him, or in furtherance of the common design or purpose. Where the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design, or in prosecution of the common purpose for which the parties were assembled or combined together; otherwise, a person might be convicted for a crime, to the commission of which he never assented, and could not be punished upon any principle of justice." And again: "There was no common design or purpose existing between the two defendants and Conrey, the officer. They had not assembled or come together for the commission of any unlawful act. They were enemies, belonging to opposite factions. And we know

of no principle upon which it can be held that the defendants are liable for the act of Conrey." And again: "They would be responsible for what they did themselves, and such consequences as might naturally flow from their acts and conduct; but they never advised, encouraged, or assented to the acts of Conrey, nor did they combine with him to do any unlawful act, nor did they in any manner assent to anything he did, and hence they could not be responsible for his conduct towards deceased. It would be a strange rule of law, indeed, to hold a man liable for a crime which he did not commit, which he did not advise, and which was committed without his knowledge or assent, express or implied." This is correct doctrine, and applicable to the facts of those cases. But there are some expressions in the opinion which suggest that there are cases pertaining to another and different rule. For instance, it is said that the parties would be responsible for a homicide actually or constructively committed by them, and they would be responsible for what they did themselves, and such consequences as might naturally flow from their acts and conduct. If the rioters in said cases had taken the man who was killed, and made a breastwork of him, it would be a different case. We do not understand the doctrine enunciated to apply to a case where the rioters might forcibly make use of another in their design, and cause him to be killed by putting him in a place of danger. The whole question here is one of causal connection. If the appellant here set in motion the cause which occasioned the death of deceased, we hold it to be a sound doctrine that he would be as culpable as if he had done the deed with his own hands. On this subject we quote from 3 Greenleaf on Evidence, § 1420, as follows: "Forcing a person to do an act which causes his death renders the death the guilty deed of him who compelled the deceased to do the act, and it not material whether the force was applied to the body or to the mind; but, if it were the latter, it must be shown that there was the apprehension of immediate violence, and well grounded, and the circumstances by which deceased was surrounded; and it need not appear that there was any other way of escape, but it must appear that the step was taken to avoid the threatened danger, and such as a reasonable man might take." Again, 1 Russell on Crimes, p. 675, says: "Forcing a person to do an act which is likely to produce his death, and which does produce it, is murder, and threats may constitute such force." Mr. Bishop, to the same effect, uses the following language: "He whose act causes in any way, directly or indirectly, the death of another, kills him, within the meaning of the law of felonious homicide. It is a rule both of reason and the law that whenever one's will contributes to impel a physical force, whether another's, his own, or a combined force, proceeding from whatever different sources, he is responsible for the result, the same as though his hand, unaided, had produced it. The contribution, however, must be of such magnitude, and so near the

result, that, sustaining to it the relation of contributory cause to effect, the law takes it within its cognizance." See 2 Bish. New Crim. Law, §§ 424, 635, 636, 637, 657, 679, 689; 1 Bish. Crim. Law, §§ 562, 563. To the same effect see 1 Whart. Crim. Law, §§ 152, 167; Whart. on Homicides, §§ 338-340; *Adams v. People*, 109 Ill. 444, 50 Am. Rep. 617. From these authorities, we apprehend, if the robbers had commanded deceased to take his place in front of the incoming train, and by threats and force compelled him to stand there, in order to wreck or stop it, that they might perpetrate a robbery, it will not be controverted that the causal connection between the acts of the robbers and the death of the deceased would be complete, in case deceased had been killed by the train, and that in such case they would be liable for his murder. It occurs to us that the causal connection in proof here was as complete. They caused deceased to go to a place of danger, he protesting. They caused him to do this by force, as the circumstances all indicate, and while he was held in place by their command he was killed by those resisting the robbery, or by the robbers themselves; and in either event we consider the immediate means of his death immaterial. This is the rule at common law, and is the logic of common sense, and is recognized by our statutes on the subject. Article 77, Pen. Code, is as follows: "If any one by employing a child or other person who cannot be punished, to commit an offense, or by any means, such as laying poison where it may be taken and with intent that it shall be taken, or by preparing any other means by which a person may injure himself, and with the intent that such person shall thereby be injured, or by any other indirect means cause another to receive an injury to his person or property, the offender by the use of such indirect means becomes a principal." Article 651 provides: "Homicide is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another." Article 656: "Although it is necessary to constitute homicide that it shall result from some act of the party accused, yet if words be used which are reasonably calculated to produce and do produce an act which is the immediate cause of death, it is homicide. As, for example: If a blind man, a stranger, child or a person of unsound mind be directed by words to a precipice or other dangerous place, where he falls and is killed, or if one be directed to take any article of medicine, food or drink, known to be poisonous, and which does produce a fatal effect—in these and like cases, the person so operating upon the mind or conduct of the person injured, shall be deemed guilty of homicide." These authorities show that the person, in order to be guilty of homicide, need not do the act of killing directly, but he can produce the cause thus by indirection, such as by force and threats operating upon the mind of another, and causing that other to take a place of danger, where he is liable to be killed. Mr. Wharton says "that it is not necessary, in order to establish a causal relation between the will and effect, that the effect should be precisely what the party

wills to do. Nor is it necessary that it should be the primary object the offender had in view, as it is sufficient if the object in view was one which could not be obtained without lawbreaking. Nor need such act of law-breaking be necessary to the execution of the purpose. It may be only incidentally involved in such purpose, yet, if the will be to effect the purpose, lawfully or unlawfully, the will is to be regarded as causing the illegal act." 1 Whart. Crim. Law, § 152. So we see that it may not have been, as is contended for by appellant, the primary object of himself and companions to have Johnson killed, without killing any one. But their act was unlawful. It was a felony. They chose to put deceased in a dangerous place, in order to consummate their purpose, regardless of whether he was killed or not. They put him there in order to effect the robbery, and while they required him to remain at the post assigned him, which was a place of danger, he was shot. His life was taken on account of their direct and lawless act, and they are responsible for his murder, whether it was occasioned by their own volition or by the shots of their adversaries; and their act was the proximate cause of the destruction of his life, and they cannot escape the consequences. Our statute defines murder essentially the same as said offense is defined at common law, and our Code further makes murder in the perpetration or attempted perpetration of robbery, etc., murder in the first degree; and the only question, therefore, is one of causal connection, and both the common law and our statutes, as we have seen, are in harmony on this proposition. Appellant was indicted as a principal, and the allegation made that he shot and killed deceased; and whether he or one of his companions fired the fatal shot, or the shot which killed him was fired by Buchanan in resistance to their attempt, they using deceased as a means to consummate the robbery, the allegation that appellant, as a principal, fired the shot which killed deceased, is equally correct. We therefore hold that the court did not err in submitting the question of causal connection, to wit, if appellant and those with him in attempting to perpetrate the robbery of the train used deceased for their purposes, and compelled him to occupy a dangerous place in order to consummate their design, then appellant would be responsible for his death. On the contrary, the court should also have instructed the jury that if appellant and those with him, engaged in the perpetration of the robbery, etc., did not compel deceased to go with them and occupy a place of danger in consummating their design, and he was killed by the opposite party, or those resisting the design to rob, then appellant would not be responsible for his death.²

² The judgment was reversed on other grounds.

"It is unquestionably true that, where two or more persons conspire or confederate together to commit a felony, each is criminally responsible for every crime committed by his co-conspirators done in pursuance of the original conspiracy, and which naturally or reasonably might be anticipated to result from it. Therefore, if either of the defendants, in attempting to commit the robbery for which they conspired, had shot and killed John Young, or had shot at John Young, and, missing him, had killed a bystander, both would

SECTION 2.—MURDER.

Homicide against the life of another, amounting to felony with malice, is either murder or petit treason. And first of murder.

The word "murder" anciently signified only the private killing of a man, for which, by force of a law introduced by King Canute for the preservation of his Danes, the town or hundred where the fact was done was to be amerced to the King, unless they could prove that the person slain was an Englishman (which proof was called Engleschire), or could produce the offender, etc. And in those days the open, wilful killing of a man through anger or malice, etc., was not called murder, but voluntary homicide.

But the said law concerning Engleschire having been abolished by 14 Edw. III, c. 4, the killing of any Englishman or foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder; and 13 Rich. II, c. 1, which restrains the king's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicide as shall not be pardoned without special words; and in the body of the act, expresses the same by "murder, or killing by await, assault, or malice prepensed."¹ And doubtless the makers of 23 Hen. VIII, c. 1, which excluded all wilful murder of malice prepense from the benefit of clergy, intended to include open as well as private homicide within the word murder.

By murder, therefore, at this day, we understand the wilful killing of any subject whatsoever through malice forethought, whether the person slain shall be an Englishman or foreigner.

1 Hawkins, P. C. c. 13.

Petit treason, according to St. 25 Edw. III, c. 2, may happen three ways: By a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. The punishment of petit treason in a man is to be drawn and hanged, and in a woman to be drawn and burned, the idea of which latter punishment seems to have been handed down to us by the laws of the ancient Druids.²

4 Blackstone, Com. 203.

have been guilty of murder. But this is not the case we have at bar. Here the homicide was not committed by the conspirators, either in the pursuance of the conspiracy or at all; but it was the result of action on the part of John Young, the proprietor of the house, in opposition to the conspiracy, and entirely contrary to the wishes and hopes of the conspirators. The defendants can in no sense be said to have aided or abetted John Young, for he was firing at them; and to hold them responsible criminally for the accidental death of a bystander, growing out of his bad aim, would be carrying the rule of criminal responsibility for the acts of others beyond all reason." *Barker, J., in Commonwealth v. Moore (Ky.)* 88 S. W. 1086, 2 L. R. A. (N. S.) 719 (1905).

¹ See "Early History of Malice Aforethought." F. W. Maitland, 8 L. Mag. & Rev. (4th Ser.) 406.

² The distinction between petit treason and murder was abolished by St. 9 Geo. IV, c. 31, § 2 (1828).

REX v. HALLOWAY.

(King's Bench, 1628. Cro. Car. 131.)

Halloway was indicted and arraigned at Newgate for murdering one Payne. The indictment was that he, *ex malitia sua præcogitata*, tied the said Payne at a horse's tail and struck him two strokes with a cudgel, being tied to the said horse, whereupon the horse ran away with him, and drew him upon the ground three furlongs, and thereby brake his shoulder, whereof he instantly died, and so murdered him.

Upon this indictment he, being arraigned, pleaded not guilty, and thereupon a special verdict found that the Earl of Denbigh was possessed of a park called Austerly Park; and that the said Halloway was woodward of his woods in the said park, and that the said Payne, with others unknown, entered the said park to cut wood there, and that the said Payne climbed up a tree, and with a hatchet cut down some boughs thereof; and that the said Halloway came riding into the park, and seeing the said Payne on the tree commanded him to descend, and he descending from thence the said Halloway struck him two blows upon the back with his cudgel; and the said Payne having a rope tied about his middle, and one end of the rope hanging down, the said Halloway tied the end of that rope to his horse's tail, and struck the said Payne two blows upon his back; whereupon the said Payne being tied to the horse's tail, and the horse running away with him, drew him upon the ground three furlongs, and by this means brake his shoulder, whereof he instantly died, and the said Halloway cast him over the pales into certain bushes. And, whether upon all this matter found the said Halloway be guilty of the murder, *prout*? they pray the discretion of the court; and if the court shall adjudge him guilty of the murder, they find him guilty of the murder; if otherwise, they find him guilty of manslaughter.

This special verdict was removed by certiorari into the King's Bench, and depended three terms; and the opinion of all the Judges and Barons was demanded, and they all (except HURTON, who doubted thereof) held clearly that it was murder, for when the boy who was cutting on the tree came down from thence upon his command and made no resistance, and he then struck him two blows and tied him to the horse's tail and then struck him again, whereupon the horse ran away, and he by that means was slain, the law implies malice; and it shall be said in law to be *prepensed malice*, he doing it to one who made no resistance. And so this term all the Justices delivered the reason of their opinions; whereupon judgment was given, and he was adjudged to be hanged, and was hanged accordingly.

PEW'S CASE.

(King's Bench, 1630. Cro. Car. 183.)

Thomas Pew was arraigned for the murder of one Gardiner, and upon evidence it appeared that the said Gardiner was a bailiff sworn and known, and under-bailiff to the dean and chapter of Westminster; and he having the sheriff's warrant to arrest the said Thomas Pew upon a *capias* out of the Common Pleas, and seeing him in Shire Lane, within the liberty of Westminster, the said Pew, seeing him come towards him, drew his sword, and the said Gardiner approaching to lay hold on him (not using any words of arrest, as was proved) Thomas Pew said (as it was proved upon examination of two witnesses before the coroner), "Stand off! come not near me! I know you well enough: come at your peril!" and the bailiff taking hold of him, he thrust him with his sword so that he died immediately. It was held by all the court that it was murder, for he coming as an officer to arrest, and not offering any other violence or provocation, although he used not the words "I arrest you," or showed him any warrant, because peradventure he had not time, nor was demanded the cause, the law presumes it to be malice and murder in him that so kills one being an officer and coming to execute process.

PENNSYLVANIA v. HONEYMAN.

(County Court of Allegheny, 1793. Add. [Pa.] 147.)

Honeyman was indicted for the murder of Benjamin Askins, on 23d November, 1793. Askins, Honeyman, and two others, Ward and Faris, had been drinking together, and were dancing in Askins' house. Ward shoved Faris, who complained of it. Ward asked if he resented it. Askins said if he did not, he would; and he threw off his clothes, and struck at Ward, who kept off the blow, and left the house. Honeyman called after him to come back and see it out, and he would see fair play. Ward would not. Honeyman turned to Askins, said, "You are a damned rascal to strike a man before he is ready," knocked him down, stamped on him, and beat him. Two or three times, as Askins raised himself to his knee, Honeyman knocked him down, telling him, "Ben, if you know when you are well, lie still." Askins died the next day of the bruises. He was a puny, weak man; Honeyman was a stout young fellow.

Brackenridge and Carson, for the defendant. Fighting on a sudden quarrel, and killing, is only manslaughter. We admit this is manslaughter. Though implied malice be sufficient to make the killing murder, still there must be malice. If there be no circumstances of malignity, or if the killing be sudden, or with a weapon not likely to kill, there is no ground for implying malice. Here there is no deliber-

ate design. The parties were in liquor. Askins and Honeyman were on terms of friendship. Askins violated the peace in his own house. Honeyman wanted to repress him, and what he did was in defense of his friend.

Galbraith, for the state, contended that from the evidence, and the law arising out of it, the killing was murder.

PRESIDENT. The unfortunate ground of this crime is that riotous intemperance, so dangerous on all occasions, especially in unguarded and unprincipled company.

This is not justifiable homicide, not having happened in the discharge of any duty; nor is it excusable, not having happened in self-defense, or by accident. It must, therefore, be felonious homicide; and the question is whether it is murder or manslaughter

Prima facie, every killing is murder, for malice is presumed, unless the prisoner show extenuating circumstances, which take away the presumption of malice. If there be no malice, it is but manslaughter. If there be express malice, or malice implied in the circumstances of the transaction, it is murder. The distinction between murder and manslaughter is nice; and cases lying on the borders of both have been often, and long and earnestly, disputed, and doubtfully decided. Hence so many special verdicts, to find whether manslaughter or murder.

I have said that every voluntary killing, or every act which apparently must do harm, which is done with intent to do harm, and done without provocation, and of which death is the consequence, is murder¹; for provocation is not presumed, and malice is presumed. The law implies malice, and the defendant must show provocation, to rebut the presumption of malice. But malice may be more than implied; it may be express. Malice express is a deliberate or formed design of taking away the life of another, or of doing him some bodily mischief; and this may be manifested either by words or actions. Implied malice is collected either from the manner of the killing, or from the person killed, or the person killing. In willful poisoning, in killing, though undesignedly, by a voluntary act, apparently mischievous, or in killing without provocation, malice is implied from the manner of the act; and it is not necessary that the malice should have existed long before. It is sufficient, if it exist at the time. Malice, as used in the definition of murder, is a technical expression, and not to be taken in the common sense of that word. In common acceptance, malice is taken to be a settled anger in one person against another, and a desire of revenge. But in this legal or technical acceptance it imports a wickedness, which includes a

¹ "There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was one of a very serious character, which might naturally and commonly involve loss of life or grievous mischief." Campbell, J., in *Wellar v. People*, 30 Mich. 20 (1874). Accord: *State v. Jarrott*, 23 N. C. 76 (1840).

circumstance attending an act, that cuts off all excuse. It is used as synonymous to frowardness of mind, and means that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit, the plain indications of a heart regardless of social duty, and fatally bent upon mischief. It is a design of doing mischief, a voluntary cruel act. Malice, therefore, is implied in every act of killing for which there is no legal justification, excuse, or extenuation.²

The excuse for murder arises from authority not wantonly or cruelly exercised or abused, or from the infirmity of the human constitution. A father may correct his child, or a master his servant, apprentice, or scholar, in a reasonable manner; and if an accidental death ensue it is only manslaughter, or perhaps homicide per infortunium. But if the correction be unreasonable, with unusual or improper weapons, or with extraordinary circumstances of cruelty, and if death be the consequence of it, such killing is murder. Such would be the case of a killing, by any person, in the preservation of the peace. If one, having no authority over another, but provoked to passion by an act of personal violence, in his passion beat the person thus violently provoking him, and by such beating kill him, it is but manslaughter. Passion excludes the presumption of malice. But if the provocation was not sufficient, or, whatever it might have been, if there was no passion excited, or, though excited, if there was time for the passion to cool, and it had subsided, the killing is murder. Cool expressions, wanton and deliberate or unusual cruelty, are evidences of want of passion, and are therefore evidences of malice. Suddenly interfering, in favor of a friend engaged in combat with another, and killing the other in defense of this friend, has been held but manslaughter. This must be on the supposition of passion excited by the danger of the person in whose favor the killer interferes in the quarrel.

The jury are the judges whether the facts be true or not. The court must judge of what description the crime is, which those facts compose, whether murder, manslaughter, or inferior homicide; for that is defining or explaining what the law is, and this is the duty of the court.

It becomes our duty, therefore, to say, on the supposition that the facts stated, and not contradicted here, were what really happened, whether they amount to manslaughter only, or to murder. This depends on whether Honeyman acted with malice aforethought in its legal sense; and this depends on whether he acted on sufficient provocation and in passion.

He had no provocation. The provocation was to Ward. There was no occasion to interfere in favor of Ward; for he had left the

² "Reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled, perhaps, with an implied negation of any excuse or justification." Holmes, C. J., in *Commonwealth v. Chance*, 174 Mass. 252, 54 N. E. 551, 75 Am. St. Rep. 306 (1899).

house, and was out of the reach of danger, if he had ever been in any, from Askins. Askins was preserving (however improperly) the peace of his own house. Honeyman had no right to interfere; and we see no interest that he had in Ward more than in Askins, nor any motive, but the love of mischief. If even there had been provocation (and there was none), Honeyman appears to have been cool, and without passion. As he knocks down Askins, he says, "If you know when you are well, Ben, lie still." His acts are voluntary, wanton, deliberate, and cruel, to a poor, weak man. They are the symptoms of a froward mind, of a wicked, depraved, and malignant spirit, the plain indications of a heart regardless of social duty and fatally bent upon mischief. They therefore manifest malice aforethought; and this killing is murder.

The jury found him guilty of murder; and sentence of death was passed on him. An application was made for a pardon, and, on a reference to the Attorney General, he suggested, as an error in the indictment, that the epithets feloniously, willfully, etc., applied to the assault, were not also applied to the stroke. On this a writ of error was brought. What the issue of this was, or whether Honeyman was pardoned, I know not.³

REGINA v. HORSEY.

(Kent Assizes, 1862. 3 Fost. & F. 287.)

Murder, the indictment laying it of a person unknown.

The prisoner had willfully set fire to a stack of straw in an inclosure, in which also was an outhouse or barn, but not adjoining to any dwelling house. While the fire was yet burning, the prisoner was seized on the spot, and the deceased was seen and heard to shriek in the flames, and his body was afterwards found in the inclosure. It did not very clearly appear whether he had been in the outhouse, or merely lying on or by the side of the stack. There was no evidence, however, who he was, and from this, coupled with the fact that he was unable to get out, it should seem that he was in the barn, and that he had been a tramp or beggar asleep when the fire was kindled. There was no evidence how or when he came there, nor any evidence that the prisoner had any idea that any one was, or was likely to be, there. On the contrary, it rather appeared that he was shocked and surprised to find that any one was in the flames, and, when he saw and heard the deceased, wanted to save him. It did not exactly appear how long the fire had been kindled before it was discovered, but very soon after it was discovered the deceased was seen and heard in the flames.

³ The judgment was afterwards reversed on the ground suggested by the Attorney General. See *Respublica v. Honeyman*, 2 Dall. 228, 1 L. Ed. 359 (1795).

The prisoner had already been convicted of the arson.

At the close of the case,

BRAMWELL, B., told the jury that the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder, even though he did not intend it; and though (he said) that may appear unreasonable, yet, as it is laid down as law, it is our duty to act upon it. The law, however, is that a man is not answerable except for the natural and probable result of his own act; and therefore, if you should not be satisfied that the deceased was in the barn or inclosure at the time the prisoner set fire to the stack, but came in afterwards, then, as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act. And in that view he ought to be acquitted on the present charge. Verdict—Not guilty.

REGINA v. SERNÉ.

(Central Criminal Court, 1887. 16 Cox, C. C. 311.)

The prisoners, Leon Serné and John Henry Goldfinch, were indicted for the murder of a boy, Sjaak Serné, the son of the prisoner Leon Serné; it being alleged that they willfully set on fire a house and shop, No. 274 Strand, London, by which act the death of the boy had been caused.

It appeared that the prisoner Serné, with his wife, two daughters, and two sons, were living at the house in question, and that Serné at the time he was living there, in midsummer, 1887, was in a state of pecuniary embarrassment, and had put into the premises furniture and other goods of but very little value, which at the time of the fire were not of greater value than £30. It also appeared that previously to the fire the prisoner Serné had insured the life of the boy, Sjaak Serné, who was imbecile, and on the 1st day of September, 1887, had insured his stock at 274 Strand for £500, his furniture for £100, and his rent for another £100, and that on the 17th of the same month the premises were burnt down.

Evidence was given on behalf of the prosecution that fires were seen breaking out in several parts of the premises at the same time, soon after the prisoners had been seen in the shop together; two fires being in the lower part of the house and two above, on the floor whence escape could be made onto the roof of the adjoining house, and in which part were the prisoners and the wife and two daughters of Serné, who escaped; that on the premises were a quantity of tissue transparencies for advertising purposes, which were of a most inflammable character, and that on the site of one of the fires was found a great quantity of these transparencies close to other inflammable materials; that the prisoner Serné, his wife, and daughters were

rescued from the roof of the adjoining house, the other prisoner being rescued from a window in the front of the house, but that the boys were burnt to death—the body of the one being found on the floor near the window from which the prisoner Serné, his wife, and daughters had escaped, and the body of the other being found at the basement of the premises.

STEPHEN J. Gentlemen, it is now my duty to direct your attention to the law and the facts into which you have to inquire. The two prisoners are indicted for the willful murder of the boy, Sjaak Serné, a lad of about 14 years of age; and it is necessary that I should explain to you, to a certain extent, the law of England with regard to the crime of willful murder, inasmuch as you have heard something said about constructive murder. Now, that phrase, gentlemen, has no legal meaning whatever. There was willful murder according to the plain meaning of the term, or there was no murder at all in the present case. The definition of murder is unlawful homicide with malice aforethought; and the words "malice aforethought" are technical. You must not, therefore, construe them, or suppose that they can be construed, by ordinary rules of language. The words ~~have to be construed~~ according to a long series of decided cases, which have given them meanings different from those which might be supposed. One of those meanings is the killing of another person by an act done with an intent to commit a felony. Another meaning is the act done with the knowledge that the act will probably cause the death of some person. Now, it is such an act as the last which is alleged to have been done in this case; and if you think that either or both of these men in the dock killed this boy, either by an act done with intent to commit a felony—that is to say, the setting of the house on fire in order to cheat the insurance company—or by conduct which, to their knowledge, was likely to cause death, and was therefore eminently dangerous in itself, in either of these cases the prisoners are guilty of willful murder in the plain meaning of the word. I will say a word or two upon one part of this definition, because it is capable of being applied very harshly in certain cases, and also because, though I take the law as I find it, I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now, when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this; that is to say, a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart or some other internal disorder, dies. To take another very old illustration, it was said that if a man shot a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or whether the Court for the Consideration of Crown Cases Reserved would hold it to be so. The present case, however, is not

such as I have cited, nor anything like them. In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, whilst that part of the law under which the crown in this case claim to have proved a case of murder is maintained. I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that every one would say, in a case like that, that when a person began doing wicked acts for his own base purposes he risked his own life as well as that of others.¹ That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That I take to be the true meaning of the law on the subject. In the present case, gentlemen, you have a man sleeping in a house with his wife, his two daughters, his two sons, and a servant, and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places, and thereby burnt two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that, if that were really done, it matters very little indeed whether the prisoners hoped the people would escape, or whether they did not. If a person chose, for some wicked purpose of his own, to sink a boat at sea, and thereby caused the deaths of the occupants, it matters nothing whether at the time of committing the act he hoped that the people would be picked up by a passing vessel. He is as much guilty of murder, if the people are drowned, as if he had flung every person into the water with his own hand. Therefore, gentlemen, if Serné and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burnt to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think in so saying the law of England lays down a rule of broad, plain, common sense. Treat a murderer how you will, award him what punishment you choose, it is your duty, gentlemen, if you think him really guilty of murder, to say so. That is the law

¹ In *Rex v. Lad*, 1 Leach, C. C. 96 (1772), where the prisoner had several times committed rape on the body of a child, in consequence of which she died, the judges seemed to doubt whether an indictment for murder could be maintained. Cf. *Reg. v. Greenwood*, ante, p. 338.

of the land, and I have no doubt in my mind with regard to it. There was a case tried in this court, which you will no doubt remember, and which will illustrate my meaning. It was the Clerkenwell Explosion Case in 1868, when a man named Barrett was charged with causing the death of several persons by an explosion which was intended to release one or two men from custody; and I am sure that no one can say truly that Barrett was not justly hanged. With regard to the facts in the present case, the very horror of the crime, if crime it was, the abomination of it, is a reason for your taking the most extreme care in the case, and for not imputing to the prisoners anything which is not clearly proved. God forbid that I should, by what I say, produce on your minds, even in the smallest degree, any feeling against the prisoners. You must see, gentlemen, that the evidence leaves no reasonable doubt upon your minds; but you will fail in the performance of your duty if, being satisfied with the evidence, you do not convict one or both the prisoners of willful murder, and it is willful murder of which they are accused. [The learned judge then proceeded to review the evidence. In the result the jury found a verdict of not guilty in respect of each of the prisoners.]

Verdict—Not guilty

STATE v. LEVELLE.

(Supreme Court of South Carolina, 1891. 34 S. C. 120.)

Mr. Justice McIVER.¹ The judge used this language in his charge: "In the eye of the law, self-destruction—suicide—is an offense. It is an unlawful act, and if a man with a deadly weapon undertakes to take his own life he is doing an unlawful act, and if in the commission or attempted commission of that act he takes the life of an innocent party standing by, then in the eye of the law that is murder." To this instruction there is no well-founded exception. In 1 Russell on Crimes (3d Am. Ed.) 424, it is said: "Whenever an unlawful act, an act *malum in se*, is done in prosecution of a felonious intention, and death ensues, it will be murder." Now, as suicide is an unlawful act, *malum in se*, and is a felony (1 Bish. Cr. Law, §§ 511-615), there can be no doubt that the proposition laid down by the judge is correct. We have carefully examined the case of Commonwealth v. Mink, 123 Mass., 422, reported also in 25 Am. Rep. 109, cited by counsel for appellant on this point, and we do not think it is applicable, for the reason that in the state of Massachusetts they have a statute providing that "any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered." Suicide, therefore, is not a felony in that state, as from the very nature of the case it cannot be punishable "by death or imprisonment in the

¹ Only so much of the opinion as relates to suicide is printed.

state prison;" and yet in that very case Gray, C. J., in delivering the opinion of the court, intimates pretty plainly that one who, in an unsuccessful attempt to commit suicide unintentionally kills another, who is endeavoring to prevent it, is guilty of murder. But in this state we have no such statute, and, on the contrary, section 2678 of the General Statutes of 1882, prescribing the form of the verdict of a coroner's inquest in a case of suicide, by the use of the term "feloniously," expressly recognizes it as retaining its common-law character as a felony.

The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed.²

See, also, cases in chapter IV.

SECTION 3.—STATUTORY DEGREES OF MURDER.

All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and pre-meditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree,³ and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

Every person convicted of the crime of murder in the first degree * * * shall be sentenced to suffer death by hanging by the neck. * * *

Public Statutes of Pennsylvania, Act 1860; P. L. 402, §§ 74, 75.

Every person duly convicted of the crime of murder in the second degree shall, for the first offense, be sentenced to undergo an imprisonment, by separate or solitary confinement, not exceeding twenty years, and for the second offense, for the period of his natural life. Id. Act 1893; P. L. 17.

² In *Grace v. State*, 44 Tex. Cr. R. 193, 69 S. W. 529 (1902), it is declared that suicide is not a crime in Texas.

For the history of the crime of suicide, see 3 Columbia L. Rev. 380.

³ The statute of 1791, of which this is a re-enactment, was the forerunner of all similar legislation in the United States.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed either

(1) From a deliberate and premeditated design to effect the death of the person killed, or of another;² or (2) by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a design to effect the death of any individual; or (3) without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony, either upon or affecting the person killed, or otherwise; or (4) when perpetrated in committing the crime of arson in the first degree.

A person who willfully, by loosening, removing or displacing a rail, or by any other interference, wrecks, destroys or so injures any car, tender, locomotive, or railway train, or part thereof, while running upon any railway in this state, whether operated by steam, electricity, or other motive power, as to thereby cause the death of a human being, is guilty of murder in the first degree, and punishable accordingly.

Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

Murder in the first degree is punishable by death.

Murder in the second degree is punishable by imprisonment for the offender's natural life.

Penal Code of New York, §§ 183-187.

COMMONWEALTH v. DRUM.

(Oyer and Terminer of Westmoreland, 1868. 58 Pa. 9.)

Justice AGNEW charged the jury as follows:³

In this case we have to deal only with that kind of murder in the first degree described as "willful, deliberate, and premeditated." Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offense. Therefore, if an intention to kill exists it is willful, if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design it is deliberate, and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to

² Under the statutes in most states the killing of another than the person intended is held to be murder in the first degree, if the killing of the person intended would have been murder in that degree, even where the statute contains no express provision to that effect. *Wareham v. State*, 25 Ohio St. 601 (1874); *State v. Payton*, 90 Mo. 220, 2 S. W. 394 (1886); *Commonwealth v. Breyessee*, 160 Pa. 451, 28 Atl. 824, 40 Am. St. Rep. 729 (1894). *Contra: Breedlove v. State*, 26 Tex. App. 445, 9 S. W. 768 (1888).

³ Agnew, J., of the Supreme Court, presided in the trial of this case, having been delegated by that court for the purpose. Only so much of the case as relates to murder is printed.

select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in the evidence.

A learned judge (Judge Rush, in *Commonwealth v. Richard Smith, 2 Wheeler, Cr. Cas. [N. Y.] 79, 86*) has said: "It is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind his scheme of murder and to contrive the means of accomplishing it." But this expression must be qualified, lest it mislead. It is true that such is the swiftness of human thought that no time is so short in which a wicked man may not form a design to kill and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find, the actual intent; that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation, as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind, fully and consciously, the intention to kill, and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, there is time to deliberate and to premeditate.

The proof of the intention to kill, and of the disposition of mind constituting murder in the first degree, under the act of assembly lies on the commonwealth. But this proof need not be express or positive. It may be inferred from the circumstances. If, from all the facts attending the killing, the jury can fully, reasonably, and satisfactorily infer the existence of the intention to kill, and the malice of heart with which it was done, they will be warranted in so doing. He who uses upon the body of another, at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an ax, a gun, a knife, or a pistol, must, in the absence of qualifying facts, be presumed to know that his blow is likely to kill, and, knowing this, must be presumed to intend the death, which is the probable and ordinary consequence of such an act. He who so uses a deadly weapon, without a sufficient cause of provocation, must be presumed to do it wickedly, or from a bad heart. Therefore he who takes the life of another with a deadly weapon, and with a manifest design thus to use it upon him, with sufficient time to deliberate, and fully to form the conscious purpose of killing, and without any sufficient reason or cause of extenuation, is guilty of murder in the first degree.

All murder not of the first degree, is necessarily of the second degree, and includes all unlawful killing under circumstances of depravity of heart and a disposition of mind regardless of social duty, but where no intention to kill exists or can be reasonably and fully

inferred. Therefore, in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be murder in the second degree.

Having stated the law of the crime, we now note the law of the evidence. And, first, it may be stated as a general rule that all homicide is presumed to be malicious—that is, murder of some degree—until the contrary appears in evidence. Therefore the burthen of reducing the crime from murder to manslaughter, where it is proved that the prisoner committed the deed, lies on him. He must show all the circumstances of alleviation or excuse upon which he relies to reduce his offense from murder to a milder kind of homicide, unless, indeed, where the facts already in evidence show it. But though the homicide, without the circumstances of alleviation or excuse, is presumed to be murder, it is not presumed to be murder of the first degree. The presumption against him rises no higher than murder in the second degree, until it is shown by the commonwealth to be murder in the first degree. It therefore lies on the commonwealth to satisfy the jury of those facts and circumstances which indicate the deliberate intention to kill, and the cool depravity of heart and conscious purpose which constitute, as before stated, the crime of murder in the first degree. When death ensues from the use of a deadly weapon in a quarrel or affray, the jury must scan closely the conduct of both parties, their former relations and behavior, and the current of events, the character of the weapon, the manner of its use, and circumstances attending it, and by a careful survey of the evidence must endeavor to arrive at the true motive and cause which prompted the fatal blow. Has there been a former difficulty? What feeling did it produce, and what design did it beget? Was the weapon prepared, and was the blow given coolly and without rage, or was it a sudden and impetuous impulse, causing the act to be committed rashly and without reflection? Were the parties engaged in mutual combat when the blow was given, or was it given when the prisoner was not fighting? Did he use the weapon when he might have avoided it, or was the attack commenced by the deceased, and continued by him until the fatal wound was given? Was the prisoner hemmed in and without means of escape? Was he in danger of life or great bodily harm, and did he give the blow with the knife under the influence of excitement and fear of loss of life or the infliction of great injury to his person?

Again, the nature of the weapon, and the place and character of the wound, are important to be considered. Was it a deadly instrument—a knife, a dagger, or dirk knife? The deadliness of the weapon tends to indicate the intention with which it is used. The place where the thrust is made also throws light on the intention. If used upon the arms or legs, it may indicate only an intention to cut and wound. If used upon a vital part of the body, it may indicate an intention to kill. All these are most pertinent inquiries to be made in this case,

in order to apply the results drawn from the evidence to the case as presented by each side.

Starting, then, with the legal presumption of innocence in favor of the prisoner, until the proof fairly establishes his guilt, the first question to be decided is whether he is guilty of murder? If he formed the designed to kill Mohigan, if in consequence of this purpose he prepared or procured a deadly weapon and carried it about with him, to be used when occasion offered itself, and if, when the opportunity arose, he did use it, it would be murder. If at the time he did the act he thought of his purpose to kill him, and had time to think that he would execute it, and formed fully in his mind the conscious design of killing, and had time to think of the weapon he had prepared, and that he would use it, and accordingly so did use it, it would be murder of the first degree. But, though he had prepared and carried the weapon, intending to use it, if, at the time the attack was made upon him, he had no real intention of killing Mohigan—did not deliberate upon his act²—but in the suddenness of the occasion and impetuosity of his temper he intended only to cut, wound, or do great bodily harm to him, it would be murder of the second degree only.

But if the weapon was not prepared for the occasion, if the prisoner entertained no previous purpose of killing Mohigan or of doing him great bodily harm, and if under the impulse of passion, caused by Mohigan's blows and arising when they were inflicted, the prisoner struck the fatal blow without malice, he is guilty of manslaughter only, even though on the instant and at the suddenness of the provocation he intended to kill Mohigan.

Lastly, if not guilty of manslaughter, was the killing only an act of self-defense? On this subject I have already said enough.

You will now take the case and render such a verdict as the evidence warrants—one which will do justice to the commonwealth and to the prisoner.

² In *Keenan v. Commonwealth*, 44 Pa. 55, 84 Am. Dec. 414 (1862), the court says: "The deliberation and premeditation required by the statute are not upon the intent, but upon the killing. It is deliberation and premeditation enough to form the intent to kill, and not upon the intent after it has been formed."

In *Leighton v. People*, 88 N. Y. 117 (1882), Danforth, J., says: "The statute is not satisfied unless the intention was deliberated upon." Cf. *People v. Conroy*, 97 N. Y. 62 (1884); *People v. Schmidt*, 168 N. Y. 568, 61 N. E. 907 (1901).

STATE v. BROWN.

(Supreme Court of Oregon, 1879. 7 Ore. 186.)

KELLY, C. J.¹ The defendant admits that he committed a robbery in the pawnshop of O'Shea, but insists that the crime was completed when he and his codefendants forcibly seized the property described in the indictment, and being completed, he denies that the killing of Joseph was done in the commission of the robbery.² We do not assent to the correctness of this conclusion. If this interpretation be given to that part of section 506 which declares that any person who kills another in the commission of any rape, arson, or robbery shall be guilty of murder, then the statute will be practically nullified. If this construction be given to that section, then a man who commits a rape which results in the death of the woman will insist that, the crime having been perpetrated before his victim died, he did not kill her in the commission of that offense, and therefore he could not lawfully be punished for the crime of murder under that section of the law. When an incendiary applies his torch to a dwelling house and sets it on fire, he has committed the crime of arson. If an hour afterwards, unknown to him, a human being should perish in the flames, ought the perpetrator of the deed to escape being punished as a murderer, because his victim was burned to death after the house was aflame?

The burglary is complete where the burglar, with intent to commit a crime, breaks and enters a dwelling house at night. If, after having committed the crime by entering the house, he should slay the owner while defending his property, could he escape punishment as a murderer under this statute, because the killing took place after the breaking into the house?

These crimes are referred to, to show what would be the effect of construing the statute as the defendant insists it ought to be construed in the case under consideration. Must the killing precede the commission of the rape, arson, or burglary in order to constitute murder under that part of the section? If so, then no one can be convicted under it, for the killing never takes place before the commission of either of those offenses.

When a person takes with force or violence the goods of another from his person or presence and against his will, he has committed robbery; or, to use the more exact phraseology of the old writers upon English criminal law, "an act of violence constitutes robbery," but it does not necessarily complete the crime. It constitutes robbery so

¹ Part of the opinion only is printed.

² The shot which caused the death of Joseph was fired when the defendant, in escaping with the booty, pursued by a constable, had run four blocks of 200 feet each, and across two streets of 60 feet each. The shot, fired at the constable, missed him and killed Joseph, who was standing nearby.

far as to render the perpetrator liable to conviction for it; but the act of robbery itself may be prolonged beyond the time when that liability is fixed. When Brown and his codefendants took the property by force from the person or presence of O'Shea, they committed the crime of robbery so far as to render themselves liable to punishment for it; but the robbery in contemplation of law was not completed until the taking and carrying away was ended. The asportation of the goods is a necessary ingredient of the robbery, as essential to complete the crime as the violence to the owner or as the seizure itself; and while anything remains to be done by the robbers to secure complete control over the property taken the robbery is incomplete. The act of taking and carrying away in the case of Brown and his codefendants commenced when the seizure was made in the pawnshop of O'Shea, and continued until they had unmolested dominion over the property which they had taken. When they first acquired that control the robbery was ended, and not before.

From the statement of facts in the bill of exceptions we are satisfied that the asportation was one continuous act, from the violent seizure, when O'Shea was stricken down senseless, until after Louis Joseph was killed. There was no cessation in flight, no casting away or secreting the property, no division of the spoils, and no disposition to relinquish control of the goods; but, on the contrary, there appeared to be a concerted action to keep possession of them, and to defend that possession, even if it became necessary to take human life to secure it.⁸

⁸ Compare *People v. Young*, 40 Misc. Rep. 256, 81 N. Y. Supp. 967 (1903).

Voluntary Handwriting Elements

- I. Intent to Hurt
 What is the desired result is wanted. 21/6/28
- II. Holding down on a sudden dent of fingers, lip & adequate pressure
 The disqualifying factor is the absence of volition, pressure of
 rest of presentation. What:
 1. The normal pressure is enough, the whole of the force - not
 necessary. [p. 371]
 2. Caring too. [p. 373]
 3. The pressure must have been received from the
 desired. [Photo, p. 385]
 4. Promoting motor fact about [see p. 382]
 5. What is adequate pressure? It is voluntary pressure
 which is sufficient. The pressure must be such as to
 cause adequate to cause the fingers to find relief
 - a. Words and letters are generally sufficient sufficient
 to induce handwriting. 114/545, Thompson, 2nd hand
 but Roschok p. 372 with
 - b. Holding on of ink is sufficient
 This is the most common of failure of pressure. 2nd hand
 holding on with [see p. 376]
 - c. The pressure upon the pen. Not sufficient. 21/6/28
 - d. Pressure on the pen
 (1) Pressure on the pen. of pressure on the pen. 2nd hand
 (2) Pressure on the pen. [see 21/6/28 p. 371]

SECTION 4.—VOLUNTARY MANSLAUGHTER.

REGINA v. MAWGRIDGE.

(Queen's Bench, 1706. Kelyng, 119.)

At the Sessions of the Peace, held at Guildhall, London, on the 1st of July, in the fifth year of the Queen, John Mawgridge, of London, Gent., was indicted, for that on the 7th of June, in the same year, he did feloniously, voluntarily, and of his malice forethought, make an assault upon William Cope, Gent., and with a sword on the left part of his breast, near the left pap, did him strike and pierce, giving him thereby a mortal wound, of which he, the said William Cope, did instantly die. Which indictment being delivered to the justices of gaol delivery for Newgate, he was arraigned thereupon, and pleaded not guilty.

The jury found this special verdict:

That William Cope was lieutenant of the Queen's Guards in the Tower, and the principal officer then commanding there, and was then upon the guard room; and that John Mawgridge was then and there, by the invitation of Mr. Cope, in company with the said William Cope and with a certain woman of Mr. Cope's acquaintance, which woman Mawgridge did then affront, and angry words passed between them in the room, in the presence of Mr. Cope and other persons there present, and Mawgridge there did threaten the woman; Mr. Cope did thereupon desire Mawgridge to forbear such usage of the woman, saying that he must protect the woman; thereupon Mawgridge did continue the reproachful language to the woman, and demanded satisfaction of Mr. Cope, to the intent to provoke him to fight; thereupon Mr. Cope told him it was not a convenient place to give him satisfaction, but at another time and place he would be ready to give it to him, and in the meantime desired him to be more civil or to leave the company; thereupon John Mawgridge rose up, and was going out of the room; and so going, did suddenly snatch up a glass bottle full of wine, then standing upon the table, and violently threw it at him the said Mr. Cope, and therewith struck him upon the head, and immediately thereupon, without any intermission, drew his sword and thrust him into the left part of his breast, over the arm of one Robert Martin, notwithstanding the endeavor used by the said Martin to hinder Mawgridge from killing Mr. Cope, and gave Mr. Cope the wound in the indictment mentioned, whereof he instantly died. But the jury do further say that immediately, in a little space of time, between Mawgridge's drawing his sword and the giving the mortal wound by him, Mr. Cope did arise from his chair where he sate, and took another bottle that then stood upon the table, and threw it at

Mawgridge, which did hit and break his head; that Mr. Cope had no sword in his hand drawn all the while; and that after Mawgridge had thrown the bottle Mr. Cope spake not. And whether this be murder or manslaughter, the jury prays the advice of the court.

A day being appointed for the resolution of the court, and the marshal required to bring the prisoner to the bar, returned he was escaped; which being recorded, the Chief Justice gave the opinion of the judges in this manner:

This record being removed into this court, the case hath been argued before all the judges; and all of us, except my Lord Chief Justice TREVOR, are of opinion that Mawgridge is guilty of murder.

This hath been a case of great expectation.

This distinction between murder, and manslaughter only, is occasioned by the statute of 23 Hen. VIII and other statutes that took away the benefit of clergy from murder committed by malice prepensed, which statutes have been the occasion of many nice speculations.¹

3. I come now to the third matter proposed, which is to consider what is in law such a provocation to a man to commit an act of violence upon another, whereby he shall deprive him of his life, so as to extenuate the fact, and make it to be a manslaughter only. First, negatively, what is not. Secondly, positively, what is. First, no words of reproach or infamy are sufficient to provoke another to such a degree of anger as to strike or assault the provoking party with a sword or to throw a bottle at him or to strike him with any other weapon that may kill him; but if the person provoking be thereby killed it is murder.

In the assembly of the judges, 18 Car. II, this was a point positively resolved. *Morley's Case*, Kel. 53.

Therefore I am of opinion that if two are in company together, and one shall give the other contumelious language (as suppose A. and B.). A., that was so provoked, draws his sword and makes a pass at B. (B. then having no weapon drawn), but misses him. Thereupon B. draws his sword and passes at A. And there being an interchange of passes between them, A. kills B. I hold this to be murder in A., for A.'s pass at B. was malicious, and what B. afterwards did was lawful. But if A., who had been so provoked, draws his sword, and then, before he passes, B.'s sword is drawn; or A. bids him draw, and, B. thereupon drawing, there happen to be mutual passes, if A. kills B. this will be manslaughter, because it was sudden, and A.'s design was not so absolutely to destroy B. but to combat with him, whereby he run the hazard of his own life at the same time. But if time was appointed to fight (suppose the next day), and accordingly they do fight, it is murder in him that kills the other. But if they go into the field immediately and fight, then but manslaughter. Suppose, up-

¹ Part of the opinion is omitted.

on provoking language given by B. to A., A. gives B. a box on the ear, or a little blow with a stick, which happens to be so unlucky that it kills B., who might have some imposthume in his head, or other ailment which proves the cause of B.'s death, this blow, though not justifiable by law, but is a wrong, yet it may be but manslaughter, because it doth not appear that he designed such a mischief.

2. Secondly, as no words are a provocation, so no affronting gestures are sufficient, though never so reproachful, which point was adjudged, 3 Cro. 779, Wats and Brains, in an appeal of murder.

There having been a quarrel between A. and B., and B. was hurt in the fray, and about two days after B. came and made a wry mouth at A., who thereupon struck him upon the calf of the leg, of which he instantly died. It was murder in A. For the affronting him in that manner was not any provocation to A. to use that violence to B.

There hath been another case which I fear hath been the occasion of some mistake in the decision of questions of this kind. Jones, W. 432, D. Williams' Case. He being a Welshman, upon St. David's Day having a leek in his hat, a certain person pointed to a Jack of Lent that hung up hard by, and said to him, "Look upon your countryman," at which D. Williams was much enraged, and took a hammer that lay upon a stall hard by and flung at him, which missed him, but hit another and killed him. He was indicted upon the statute of stabbing. Resolved, he was not within that statute, but guilty of manslaughter at common law. I concur with that judgment, that it is not within the statute of stabbing, for it is not such a weapon or act that is within that statute, neither could he be found guilty of murder, but only of manslaughter, for the indictment was for no more. But if the indictment had been for murder, I do think that the Welshman ought to have been convicted thereof, for the provocation did not amount to that degree as to excite him designedly to destroy the person that gave it him.

3. Thirdly, if one man be trespassing upon another, breaking his hedges or the like, and the owner or his servant shall upon sight thereof take up an hedge-stake and knock him on the head, that will be murder, because it was a violent act beyond the provocation, which is sufficiently justified by Halloway's Case, who did not seem to intend so much the destruction of the young man that stole the wood as that he should endeavor to break his skull or knock out his brains, yet using that violent and dangerous action of tying him to the horse-tail rendered him guilty of murder.

Having in these particulars shown what is not a provocation sufficient to alleviate the act of killing, so as to reduce it to be but a bare homicide, I will now, secondly, give some particular rules, such as are supported by authority and general consent, and show what are always allowed to be sufficient provocations.

1. First, if one man upon angry words shall make an assault upon another, either by pulling him by the nose or filliping upon the fore-

head, and he that is so assaulted shall draw his sword and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault. Besides, he that was so affronted might reasonably apprehend that he that treated him in that manner might have some further design upon him.

There is a case in *Stiles*, 467, *Buckner's Case*. Buckner was indebted, and B. and C. came to his chamber upon the account of his creditor to demand the money. B. took a sword that hung up, and was in the scabbard, and stood at the door with it in his hand undrawn to keep the debtor in until they could send for a bailiff to arrest him. Thereupon the debtor took out a dagger which he had in his pocket and stabbed B. This was a special verdict and adjudged only manslaughter, for the debtor was insulted and imprisoned injuriously without any process of law, and though within the words of the statute of stabbing, yet not within the reason of it.

2. Secondly, if a man's friend be assaulted by another, or engaged in a quarrel that comes to blows, and he, in the vindication of his friend, shall on a sudden take up a mischievous instrument and kill his friend's adversary, that is but manslaughter; so was the case, 12 Rep. 87. If two be fighting together, and the friend of the one takes up a bowl on a sudden and with it break the skull of his friend's adversary, of which he died, that is no more than manslaughter. So it is, if two be fighting a duel, though upon malice prepensed, and one comes and takes part with him that he thinks may have the disadvantage in the combat, or it may be that he is most affected to, not knowing of the malice, that is but manslaughter. Pl. Com. 101, *John Vaughan and Salisbury*.

3. Thirdly, if a man perceives another by force to be injuriously treated, pressed and restrained of his liberty, though the person abused doth not complain or call for aid or assistance, and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter, 18 Car. II, adjudged in this court upon a special verdict found at the Old Bailey in the case of one *Hugett*, 18 Car. II. A. and others, in the time of the Dutch war, without any warrant impressed B. to serve the king at sea. B. quietly submitted, and went off with the press masters. *Hugett* and the others pursued them and required a sight of their warrant; but they showed a piece of paper that was not a sufficient warrant. Thereupon *Hugett* with the others drew their swords, and the press masters theirs, and so there was a combat, and those who endeavored to rescue the pressed man killed one of the pretended press masters. This was but manslaughter; for when the liberty of one subject is invaded it affects all the rest. It is a provocation to all people, as being of ill example and pernicious consequence. All the judges of the King's Bench, viz., *Keiling*, *Twisden*, *Wyndham* and *Moreton*, were of opinion that it was murder, because he meddled in a matter in which he

was not concerned. But the other eight judges of the other courts conceived it only manslaughter, to which the judges of the King's Bench did conform, and gave judgment accordingly.

4. Fourthly, when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of a man, and adultery is the highest invasion of property. 1 Vent. 158; Raymond, 213, Manning's Case.

If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law, though it may seem hard that the killing in the one case should not be as justifiable as the other. 20 Leviticus, v. 10. If one committeth adultery with his neighbor's wife, even he the adulterer and the adulteress shall be put to death. So that a man cannot receive a higher provocation. But this case bears no proportion with those cases that have been adjudged to be only manslaughter, and therefore the court, being so advised, doth determine that Mawgridge is guilty of murder. More might be said upon this occasion, yet this may at present suffice to set the matter now in question in its true light, to show how necessary it is to apply the law to exterminate such noxious creatures. Upon this condition the court did direct that process should be issued against Mawgridge, and so to proceed to outlawry if he cannot be retaken in the meantime.

STATE v. HILL.

(Supreme Court of North Carolina, 1839. 20 N. C. 629. 34 Am. Dec. 396.)

The prisoner was indicted for murder, at Wake, on the last circuit, before his honor, Judge Saunders.

The jury returned a verdict of guilty, and, sentence of death being pronounced upon the prisoner, he appealed.

GASTON, Judge.¹ The jury were instructed "that if the prisoner gave the first blow, and was then cut by the deceased, although he might have been agitated by excitement and anger, yet if they collected from what he said and did, when or just before he gave the mortal blow, that in fact he was possessed of deliberation and reflection, so as to be sensible of what he was then about to do, and did the act intentionally, it was murder." This proposition, as we understand it, and as we must believe it to have been understood by the jury, we are very confident cannot be sustained.

The proposition supposes that the first assault was made by the prisoner without malice, and that the fatal wound was given while under the influence of indignation and resentment, excited by the ex-

¹ Part of this case is omitted.

cessive violence with which he had been in turn assailed by the deceased; but it refuses to the prisoner the indulgence which the law accords to human infirmity suddenly provoked into passion, if such passion left to him so much of deliberation and reflection as to enable him to know that he was about to take, and to intend to take, the life of his adversary. No doubt can be entertained, and it is manifest that none was entertained, by his honor, but that the excessive violence of the deceased, immediately following upon the first assault, constituted what the law deems a provocation sufficient to excite furious passion in men of ordinary tempers. The case does not state that the first blow given by the prisoner was such as to endanger life or to threaten great bodily harm, nor that it was immediately followed up by further efforts or attempts to injure the deceased. It must be taken to have been a battery of no very grievous kind, and it justified the deceased in resorting to so much force on his part as was reasonably required for his defense; and in estimating the quantum of force which might be rightfully thus used the law will not be scrupulously exact. But, when an assault is returned with a violence manifestly disproportionate to that of the assault, the character of the combat is essentially changed, and the assaulted becomes in his turn the assailant. Such, according to the case, was the state of this affray, when the mortal wound was given. To avenge a blow, the deceased attacked the prisoner with a knife, made three cuts at him, and gave him a severe wound in the abdomen. If instantly thereupon, in the transport of passion thus excited, and without previous malice, the prisoner killed the deceased, it would have been a clear case of manslaughter. Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumes that passion disturbed the sway of reason and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent, but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefore as an infirm human being. We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the *furor brevis*, renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity.

The proper inquiry to have been submitted to the jury on this part of the case was whether a sufficient time had elapsed after the prisoner was stabbed, and before he gave the mortal wound, for passion to subside and reason reassume her dominion; for it is only during the temporary dethronement of reason by passion that this allowance is

made for man's frailty.² And in prosecuting this inquiry every part of the conduct of the prisoner, as well words as acts tending to show deliberation and coolness on the one side, or continued anger and resentment on the other, was fit to be considered, in order to conduct the jury to a proper result.

Judgment to be reversed.

STATE v. McCANTS.

(Court of Appeals of South Carolina, 1843. 1 Speers, 384.)

The indictment charged the prisoner with having murdered William Ladd on the 19th of March, 1842, by stabbing him to the heart with a pocket knife.

The jury found a verdict of guilty, but recommended to executive clemency.

The defendant appealed on the following grounds:

(1) Because the fatal blow was given in heat and passion, reasonably excited during a sudden affray, and therefore the killing was only manslaughter.

(2) Because his honor charged the jury that the material question for them was whether the interval between the first and second combat afforded time for a reasonable man to cool, whereas it is respectfully submitted the jury should have been charged to inquire whether the suspension of reason arising from sudden passion excited during the affray continued down to the time of the mortal stroke given, or whether there were any such marks of deliberation as showed that the prisoner did cool before giving the mortal stroke.³

CURIA, per WARDLAW, J. The second and third grounds of appeal seem to show that the counsel for the prisoner did not understand the charge of the presiding judge precisely as it has been reported; but the objections which have been supposed to lie against the charge as reported, in relation to the question of cooling and the consideration which should be given to drunkenness, have been, under these grounds fully discussed. It has been argued, under the second ground, that the sole question as to cooling is whether the suspension of reason continued down to the time of the mortal stroke, and that so it must have done if no marks of deliberation showed that the prisoner had cooled; whereas, the charge (not, however, stating the question of reasonable time to be the only question, or, as above others, the material question), held that, as to cooling, the questions were,

² "A transport of passion, which deprives of the power of self-control, is in a modified or restricted sense, a dethronement of the reasoning faculty, a divestment of its sovereign power; but an entire dethronement is a deprivation of the intellect for the time being." Clopton, J., in *Smith v. State*, 83 Ala. 28, 3 South. 551 (1887).

³ Part of this case is omitted.

did the prisoner cool, or was there time for a reasonable man to have cooled? and that, reference being had for a standard to ordinary human nature, the time allowed for cooling was the time in which an ordinarily reasonable man, under like circumstances, would cool. Any signs of deliberation or reflection would be evidence of cooling; but apart from all such signs, after a sufficient lapse of time, the law will presume opportunity for cooling. "If, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled any time before the fatal stroke given, or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder." 1 E. P. C. 252; 1 Russ. on Cr. 442. "Provocation will not avail, how grievous soever it may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected." 1 Russ. on Cr. 423.

Whether the lapse of time be taken as only evidence of cooling, or as a substitute for it, which takes away the peculiar indulgence of the law for sudden transport of passion, it was proper to submit the question in the double form: Did the prisoner cool? or was there reasonable time for his cooling? An affirmative answer to either of which would be fatal to his attempt at mitigation. In the case of *Rex v. Onebey*, 1 Ld. Ray. 1485, from which East, Russell, and other elementary writers have drawn their doctrine on this subject, time seems to have been considered only amongst the other evidences of cooling; and in the charge before us it is said that from the reasonable time cooling and malice will be inferred. *Onebey's Case*, however, decides that whether the accused cooled is not a question of fact, but a question of law, to be decided by the court, upon consideration of the length of time and all other circumstances found by the jury upon a special verdict; and in accordance is the case of *Regina v. Fisher*, 8 Car. & P. 182, 34 E. C. L. R. 345, in the Central Criminal Court, before Mr. Justice Park, Mr. Baron Parke and Mr. Recorder Law, where what time shall be reasonable is said to be for the court, the jury having found the length. The legal conclusion that the accused had cooled, deduced by the court from the circumstances, is only, in other words, the conclusion that he should have cooled—that the circumstances are such, as in law, will imply deliberation. Was he cool means, not was there in fact a gentle flowing of the blood which had been hurried in its circulation, but means was there, in law, malice in his act; and the reasonable time is then not mere evidence of actual cooling, or cooling in its popular sense, but is in itself a circumstance which in law stands in place of such actual cooling and is equally significant of malice. He who has received a sufficient legal provocation, such as might have mitigated to manslaughter a mortal blow proceeding from it and given instantly, would not be less than a murderer if he should remain in apparently undiminished fury for a length of time, unreasonable under the circumstances, and then kill. By lashing himself into greater fury by outward demonstrations of passion, no one should

obtain upon trial any advantage over another, who, in like circumstances, should in reasonable time master his passions, or at least cover with a calm exterior the fires which inwardly consume him. The law, in extending its indulgence to human frailty, does not look merely to the fact that the act has proceeded from the violent impulse of anger outstripping the tardier operations of reason. It asks whether the anger has been provoked by sufficient cause, whether it has been proportioned to the cause, whether it has been restrained from barbarous punishment, and whether it has been made to yield to the empire of reason in proper time. No anger, however violent, will mitigate the guilt of him who snatches a deadly weapon upon provocation by words only, no matter how hard to be borne. Even where the provocation has been what is called legal, but slight, and the death of the aggressor has ensued from an instant act of resentment, no matter how uncontrollable the passion, the inquiry is, was the act of resentment in reasonable proportion to the provocation?² And where anger, excited by blows, has according to the frequent course of nature increased with its gratification, and blows given in return have redoubled upon blows, malice would be presumed from unreasonable and disproportionate excess of punishment. So, when anger, provoked by a cause sufficient to mitigate an instantaneous homicide, has been continued beyond the time which, in view of all the circumstances of the case, may be deemed reasonable, the evidence is found of that depraved spirit in which malice resides.

The law regards men as rational creatures, and expects them to subject their passions to reasonable control. The abatement of its reign, which it grants to such frailty as is common to human nature, it does not extend to unreasonable and excessive indulgences of passion. The standard of what is reasonable is ordinary human nature, to be applied by the court if all the facts and circumstances be found by a special verdict or to be applied by the jury in giving a general

² "If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on a husband would bring the killing of her below murder. Upon this view I have always doubted *Stedman's Case*, in which, for a woman's blow in the face with an iron patten, given to a soldier in return for words of gross provocation, he gave her a blow with the pommel of his sword on her breast, and then ran after her and stabbed her in the back, and the crime was held to be only manslaughter. *R. v. Stedman*, *Fost.* 292. Where a blow is cruel or unmanly, the provocation will not excuse it." *Gibson, C. J., in Commonwealth v. Mosler*, 4 Pa. 268 (1846).

"In the light of the evidence in this case the doctrine of 'cooling time' does not apply. The deceased did not offer to strike the prisoner, and therefore gave him no legal provocation. 'Words of reproach and of insult, however grievous, do not make legal provocation, nor do indecent or provoking actions, or gestures expressive of contempt or reproach, unless accomplished with indignity to the person, as by a battery, or an assault, at least. * * * In the absence of such provocation, there is in the eye of the law no adequate cause for such furious state of mind of the prisoner and excessive heat of blood as will mitigate the crime from murder to manslaughter. In such a case there is no occasion for cooling time.' *State v. McNeill*, 92 N. C. 812." *Montgomery, J., in State v. Spivey*, 132 N. C. 991, 43 S. E. 475 (1903).

verdict. As to the reasonable time in which cooling should ensue after provocation, no precise rule can be given. In *Onebey's Case*, the cooling was held to take place, not when calmness has been restored, but when that fury of passion which, for a brief time, takes away the reasoning faculties, has abated, or that the accused reflects; and in *Lord Morley's Case*, cited by Lord Raymond, it was held that, to make it murder, the time need be such time only as it may appear not to be done on the first passion, and that an observation made as to the conveniency of a place for fighting, showed the temper to be such as constituted murder.

In all cases where the time of cooling may be considered, whether the time be regarded as evidence of the fact of cooling, or as constituting of itself, when reasonable, legal deliberation, the whole circumstances are to be taken into the estimate in determining whether the time be reasonable. The nature of the provocation, the prisoner's physical and mental constitution, his condition in life and peculiar situation at the time of the affair, his education and habits (not of themselves voluntary preparations for crime), his conduct, manner, and conversation throughout the transaction—in a word, all pertinent circumstances—may be considered, and the time in which an ordinary man in like circumstances would have cooled is the reasonable time.

The motion is dismissed.

RICHARDSON, O'NEAL, EVANS, and BUTLER, JJ., concurred.

STATE v. GRUGIN.

(Supreme Court of Missouri, 1898. 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553.)

SHERWOOD, J.¹ The salient topics which this record presents, and on which our attention will be centered, are these:

First. Did the outrage perpetrated by Hadley on his young sister-in-law Alma, defendant's daughter, authorize and require a submission to the jury of the question whether defendant's shooting Hadley was done in "hot blood," and therefore only manslaughter?

Second. Did the insolent and defiant reply of Hadley, when questioned by defendant as to the vile deed he had done to the latter's daughter, authorize and require a submission to the jury of the question whether the words used by Hadley were such as to generate a sufficient or reasonable provocation, so as to produce hot blood, and thus lower the grade of the homicide in either degree to manslaughter?

Third. Whether certain instructions given at the instance of the state should have been refused?

Fourth. Whether a certain instruction asked by defendant should have been given, either as asked or in a modified form?

¹ Arguments of counsel and part of the opinion are omitted.

1. In discussing the first question propounded, we are necessarily brought into contact with that line of cases which treat of "hot blood" and how it may be engendered. Among other familiar instances furnished by the books are those where a husband finds a man in the act of adultery with his wife and immediately kills him or her. That is accounted but manslaughter, and it is the lowest degree of that offense; and therefore in such a case the court directed the burning in the hand, to be gently inflicted, because there could not be a greater provocation. Sir T. Raym, 212.

According to the old books, such discovery of the wife's adultery must have been made in the very act, and the killing must have been done "directly on the spot" in order to reduce the homicide to manslaughter. 4 Black. Com. 191; 3 Greenl. Ev. (14th Ed.) § 122. The husband must have "ocular inspection of the act, and only then." Pearson's Case, 2 Lew. 216; 1 Hale, P. C. 487.

But since the law, as other sciences, makes progress, it is no longer accounted necessary that a husband should have "ocular inspection," etc. It suffices if the provocation be so recent and so strong that the husband could not be considered at the time master of his own understanding. *State v. Holme*, 54 Mo. 153. In the case just cited, the case of *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781, was approved, the facts in that case having been these: "The prisoner offered evidence tending to show the commission of adultery by H. with the prisoner's wife. Within half an hour before the assault the proof showed that the prisoner saw them going into the woods together under circumstances calculated strongly to impress upon his mind the belief of an adulterous purpose; that he followed after them to the woods; that they were seen not long after coming from the woods, and that the prisoner followed on in hot pursuit, and was informed on the way that they had committed adultery the day before; that he followed H. into a saloon in a state of excitement, and there committed the assault. The court held that the evidence was proper, as from it it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which would have given to the homicide, had death ensued, the character of manslaughter only. The evidence showed that the prisoner, in following H. from the woods, was laboring under great excitement, that when a friend told him on the way what had happened the day before his passion was increased, and that when he arrived at the saloon the perspiration had broken out all over his face." And in that case it was ruled that the question as to what is an adequate or reasonable provocation is one of fact for the jury, and so, also, is the question whether a reasonable time had elapsed for the passion to cool and reason to resume its control.

In this connection it must not be forgotten what a high estimate the men of all nations have placed on the chastity of their women

and on the inviolability of their persons. Some of the fiercest tumults and wars have had their origin in assaults made on the modesty or honor of women. Notwithstanding this, the law as yet has made no provision and provided no punishment for many such instances; nay more, a brother who detected a man in the act of adultery with his sister, and thereupon stabbed him to death, was by the Supreme Court of Pennsylvania adjudged guilty of murder. *Lynch v. Commonwealth*, 77 Pa. 205.

Lord Macauley, in his "Report on the Indian Code," very forcibly points out the gross injustice of accounting a husband who slays an adulterer, found with his wife, only guilty of manslaughter, and yet holds a high-spirited brother, who in a paroxysm of rage kills the seducer of his sister, guilty of murder. Proceeding further, Lord Macauley says: "There is another class of provocations which Mr. Livingston does not allow to be adequate in law, but which have been, and while human nature remains unaltered will be, adequate in fact to produce the most tremendous effects. Suppose a person to take indecent liberties with a modest female in the presence of her father, her brother, her husband, or her lover, such an assault might have no tendency to cause pain or danger, yet history tells us what effects have followed from such assaults. Such an assault produced the Sicilian Vespers. Such an assault called for the memorable blow of Wat Tyler. It is difficult to conceive any class of cases in which the intemperance of anger ought to be treated with greater lenity. So far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter."

When testifying before the "Homicide Amendment Committee" in 1874, Blackburn, J., said: "Supposing a man is actually keeping company with a young woman, she cannot be called his sister or his ward, or even under his protection; and suppose a ruffian steps forward and in the presence of the other pulls up her petticoats and catches hold of her, and the other struck him down and the man died. That case was before Mr. Justice Pattison at York. Somehow or other the jury and Mr. Justice Pattison contrived to acquit him altogether. I think that was provocation that would reduce it to manslaughter."

• If, as Bishop states, the "law accepts human nature as God has made it, or as it manifests itself in the ordinary man, and every sort of conduct in others which commonly does in fact so excite the passions of the mass of men as practically to enthrall their reason, the law holds to be adequate cause," I do not see how defendant is to be denied the benefit of that theory in the painful circumstances of the present case. To him, in contemplation of law, the foul wrong done his child, though not revealed to him until the morning of the day of the homicide, was as fresh and potent to stir his blood as if

makes the affray. And this was the opinion of myself and some others." 1 Hale, P. C. 456.

Now in the case Hale supposes it is, as he says, the second stroke that made a "new provocation"; but the second stroke was given by A. Then what made the old provocation? Evidently the "indecent words" of A., which, given by A. to B., prompted the latter to give the first stroke. So, in Morley's Case it was agreed that "if upon ill words both of the parties suddenly fight, and one kill the other, this is but manslaughter; for it is a combat betwixt two upon a sudden heat, which is the legal description of manslaughter." 6 How. St. Tr. 771. In that instance, also, it must be noted that "ill words" were the provocation that made the hot blood which resulted only in manslaughter. To test this matter further, suppose no "ill words" used, what then the crime? Evidently murder.

It is said in the books that, though an insufficient assault or demonstration do not import coming violence, still it and insulting words combined may so excite the passions as to reduce the killing to manslaughter. 2 Bishop's New Cr. Law, § 704.

If the inchoate assault be naught as provocation, and the opprobrious words be naught as provocation, I am unable to see how the addition of these two ciphers can make a unit. "The moment, however, the person is touched with apparent insolence, then the provocation is one which, ordinarily speaking, reduces the offense to manslaughter." 1 Whart. Cr. Law (10th Ed.) § 456. And it is held that such "apparent insolence" may be manifested in a variety of ways, as, for instance, by a contemptuous jostling on the street, by tweaking the nose, by filiping on the forehead, or by spitting in the face. In most of these instances and illustrations there is no physical pain or injury inflicted. The "sudden heat" springs from the indignity the insult offered, and from nothing else. Kelly, Cr. Law, § 518. This being true, the law should not be so unreasonable as to deny to an insult offered in words the same force and effect which all men recognize that it has as a matter of fact. If it "so excite the passions of the mass of men as to enthrall their reason, the law should hold it adequate cause" for the reduction of the grade of the offense resulting from the use of the insulting words. No sound distinction can, it seems, be taken in principle between insult offered by acts and that offered by foul and opprobrious words.

I will now refer to some adjudications where insulting words have been held a sufficient basis for a charge or an instruction on the offense of manslaughter. Where the prisoner was indicted for the willful murder of his wife, Blackburn, J., in summing up, said: "As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hear from his wife that she had committed adultery, and he, having no idea of such a thing before, were

thereupon to kill his wife, it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee. I have done it once, and I'll do it again.' Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did?" *Reg. v. Rothwell*, 12 Cox, C. C. 145. In that case (tried in 1871) the husband seized a pair of tongs, close at hand, and struck his wife three violent blows on the head, from which she died within a week, and the verdict was for manslaughter.

[The Court here reviewed *Reg. v. Smith*, 4 Fost. & F. 1066; *Seals v. State*, 3 Baxt. (Tenn.) 466, and *Wilson v. People*, 4 Parker, Cr. R. (N. Y.) 619, and continued:]

So it will be seen that there are circumstances where words do amount to a provocation in law; i. e., a reasonable provocation to be submitted to the determination of the jury, and, if found by them to exist, then the crime is lowered to the grade of manslaughter. If there ever was a case to which this principle should be applied, it would seem it should be applied to the case at bar. A father is informed that his young daughter, just budding into womanhood, has been ravished by his son-in-law, while under the supposed protection of his roof. Arriving where the son-in-law is, and making inquiry of him why he had done the foul deed, that father receives the answer, "I'll do as I damn please about it." This insolent and defiant reply amounted to an affirmation of Hadley's guilt! So long as human nature remains as God made it, such audacious and atrocious avowals will be met as met by defendant. It should be held, therefore, that the words in question should have been left to the jury to say whether, in the circumstance detailed in evidence, they constituted a reasonable provocation, and, if so found, that then defendant was guilty of no higher offense than manslaughter in the fourth degree.

The judgment should be reversed, and the cause remanded. *BURGESS*, J., concurs in toto. *GANTT*, P. J., does not concur as to that portion of paragraph 2 in reference to words being regarded as a reasonable provocation by either court or jury.²

² Compare *State v. Neville*, 51 N. C. 423 (1859); *Hardcastle v. State*, 36 Tex. Cr. R. 555, 38 S. W. 186 (1896); *State v. Senegal*, 107 La. 452, 31 South. 867 (1902).

STATE v. YANZ.

(Supreme Court of Errors of Connecticut, 1901. 74 Conn. 177, 50 Atl. 37, 54 L. R. A. 780, 92 Am. St. Rep. 205.)

BALDWIN, J. The trial court, in its charge to the jury, used this language: "If in fact no adultery was going on, and the husband is mistaken as to the fact, though the circumstances were such as to justify a belief even of adultery, the offense would not be reduced to manslaughter. The husband must judge at his peril that the jury may find that he was mistaken, and so find him guilty of murder instead of manslaughter."

The law justifies a jury in calling it manslaughter when, on finding his wife in the act of adultery, a man, in the first transport of passion, kills her paramour. This is because, from a sudden act of this kind, committed under the natural excitement of feeling induced by so gross an outrage, malice, which is a necessary ingredient of the crime of murder, cannot fairly be implied. The excitement is the effect of a belief, from ocular evidence, of the actual commission of adultery. It is the belief, so reasonably formed, that excites the uncontrollable passion. Such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act in fact committed.

The law deems a husband's passion, excited by surprising his wife in the act of adultery, so far uncontrollable, from the frailty of human nature, that, if he kill her paramour on the impulse of the moment, and no actual malice is disclosed, none ought to be implied. He is not justified; but he is not a murderer. The reason of this rule of law being the existence of an uncontrollable passion, naturally induced, it must logically follow that it suffices if such a passion has been naturally induced in the mind of the slayer by the sight of his wife in the embrace of the man whom he killed and a reasonable belief of her guilt, formed under circumstances such as those to which the accused testified in the present case. If the jury believed this testimony, or so much of it as showed a state of facts which, in their opinion, justified and produced a reasonable belief on the part of the accused that adultery was being committed when the shot was fired, then, there having been no proof of actual malice, although they may also have believed that it was fired intentionally, the natural excitement of passion and want of premeditation make the offense manslaughter. *Morris v. Platt*, 32 Conn. 75, 83. There is error. The judgment is set aside, and a new trial is ordered.

TORRANCE and HALL, JJ., concurred. ANDREWS, C. J., dissented.

HAMERSLEY, J. (dissenting). The particular passage of the charge claimed to be erroneous is this: "If in fact no adultery was going on, and the husband is mistaken as to the fact, though the circumstances were such as to justify a belief even of adultery, the offense would

not be reduced to manslaughter." The statement is correct. The particular form of manslaughter the court was called upon to explain was this: An intentional killing in a transport of passion induced by an immediate wrong done to the killer by the person killed, which the law deems to be of such nature that the ordinary man is unable, under the first sting of its infliction, to control a natural impulse to punish the offender. Such an injury, if unprovoked, constitutes a provocation which may render the immediate killing of the offender, in the transport of sudden anger caused by the injury received, manslaughter, and not murder. It is a principle common to most systems of jurisprudence, arising from essential conditions of life, that the punishment for unjustifiable, intentional killing should be less severe when the fatal blow is impelled by a transient rage, reasonably induced by and immediately following a wrongful act done by the person killed to the slayer. Such wrongful act constitutes legal provocation, which demands the milder punishment; that is, under our law reduces murder to manslaughter. It should, however, be remembered that to call for the milder punishment the killing must be in fact the result of a sudden rage, difficult for the ordinary man to control, directly induced by a grievous injury. If in fact it is the result of the cruel spirit of revenge that must have life for a wrong, it is murder, no matter what the provocation may be. In drawing the line between the crimes of murder and manslaughter, the law repels the notion that killing in revenge can be less than murder. The cases in which particular facts have been held to show legal provocation point to a principle, common to all, by which each is determined, and suggests its foundation, namely, when the mind of the slayer is not possessed by that conscious cruelty indicated by voluntary killing, but by a sudden transient rage, being the natural product of an injury then done to him by the person killed, the offense may be manslaughter. Mere rage is insufficient. It must arise directly from an injury then received, which must be as real as that caused by a severe battery. Mere insult is insufficient in law to produce this rage, unless it involve some grievous injury; not a fanciful one, such as may result from mocking words or gestures, but a substantial injury, such as may be caused in some conditions of life by an unpunished personal affront, or such as may be suffered by a husband or father in the degradation of his wife or child. It is the combination of adequate insult and injury received, of sudden and uncontrollable transient rage thereby naturally produced, and of unlawful killing directly resulting from that rage, which marks such killing as manslaughter. The essence of the common law, as affecting the distinction between murder and manslaughter (excluding some arbitrary tests), is this: Murder implies the presence as dominating a voluntary act causing death of an inhuman or unnaturally cruel state of mind; manslaughter implies its absence. It is thus stated by Lord Holt in 1707: "He that doth a cruel act voluntarily, doth it of malice prepensed." *Reg. v. Mawgridge*, 1 Kel. 119 et seq. Sir J. F. Stephen

characterizes this definition of malice aforethought as correct and happy, and, with the insertion of the words "or cruelly reckless" as solving nearly all questions as to the distinction between murder and manslaughter. 1 Steph. Hist. Cr. Law Eng. pp. 70, 73. Russell thus explains what may be involved in a cruel act: "Violent acts of resentment, bearing no proportion to provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often make malice." 1 Russ. Cr. (9th Am. Ed.) 713. Intentional unlawful killing is necessarily a cruel act, which implies murder; but when the person killed is himself the aggressor, through giving a provocation adequate to produce a sudden anger and impulse to punish the wrong, sufficient to dominate the will of the killer, the inherent cruelty of the act is so far modified as to make the offense manslaughter. Provocation, therefore, is legally effective, because for the moment it prevents, subdues, or excludes from the mind of the criminal actor that unnatural cruelty which is the earmark of murder through the controlling presence of natural rage immediately induced by an adequate injury. The essential test of an adequate injury is its inherent and judicially known capacity, under existing social conditions, to cause such rage, as a rule, when inflicted on the ordinary man. The conditions to which this part of the charge applied were these: (1) An admittedly intentional unlawful killing; (2) in a transport of rage; (3) induced by an injury and insult done to the defendant by adultery committed with his wife in his presence. To make the offense manslaughter, the injury must have been done. Intentional unlawful killing in a rage is murder, and not manslaughter. Anger, thirsting for the blood of an enemy, is in itself an earmark of murder, no less than revenge or brutal ferocity; but when it is provoked by the wrongful act of the person slain, who thus brings upon himself the fatal blow, given in the first outbreak of rage, caused by himself, the offense is manslaughter, not only because the voluntary act is, in a way, compelled by an ungovernable rage, but also because the victim is the aggressor, and his wrong, although it cannot justify, may modify, the nature of the homicide thus induced. The court therefore correctly told the jury that, to make the offense manslaughter, the injury claimed as a provocation must have in fact been done. Our law of homicide recognizes no provocation as legally competent to so modify the cruelty of intentional, unlawful killing as to reduce the offense to manslaughter, except the provocation involved in an actual and adequate injury and insult. A different rule of provocation applies when the killing is not intentional, as where it results from the use of force, not intended, and not naturally adapted, to cause death. But, where the killing is both intentional and unlawful, the only legal provocation is that given by an actual injury and insult.

The decision of the majority of the court is based on the assertion that the intentional unlawful killing of an innocent person who has done the slayer no wrong may be manslaughter, or, in other words,

an actual injury done to the slayer is not essential in order to reduce such killing from murder to manslaughter. I find no authority in our law for this assertion. During the three centuries in which the distinction between the crime of murder and that of manslaughter has been developed and established, there is, so far as I have been able to discover, no dictum of jurist or decision of court which has failed to recognize the necessity of an actual injury and insult given by the killed and suffered by the killer as necessary to the reduction of intentional, unlawful killing from murder to manslaughter. It seems to me unquestionable that the decision involves a clean-cut and radical change of existing law. I think such a change would be unwise, and inconsistent with the considerations of public policy that underlie our law of homicide. It is, however, unnecessary to discuss the wisdom of the change, for it is one within the province of the Legislature, and not of the court, to make.

I think there is no error, and that a new trial should be denied.¹

For involuntary manslaughter, see chapter IV.

¹ Parts of the opinion of Baldwin, J., and Hamersley, J., are omitted.

"The seventh request was: 'If the jury believed that the defendant assisted in killing Ouloosian, but under threats against the defendant by Kasper, as shown by the evidence, then they are to find the defendant guilty of manslaughter.' This request was refused. We have already seen that the intentional killing of another under threats is held to be murder. The only ground upon which the request is urged—indeed, the only one upon which it can be urged—is that fear, like passion, may so cloud the mind as to eliminate malice. The comparison of the two elements of action is not apt. One's own passion is not a defense to reduce a crime, unless it is caused by provocation, like a fight or a gross indignity, between the victim and the assailant. Passion induced by a third person would be no defense to a homicide. So fear induced by one person is no defense to a defendant who kills another under its influence. This, of course, is a general rule; but it applies to this case. There might be cases, like a panic, where a general fear might not only reduce, but even excuse, an unlawful act; but such is not this case. If one has sufficient power of mental action to put his own chances of safety against the life of an innocent third person, his act can neither be entitled to excuse nor reduction on the ground of fear. Something more, at least, must appear than is shown in this request or in this case." Stiness, C. J., in *State v. Nargashian*, 26 R. I. 299, 58 Atl. 953, 106 Am. St. Rep. 715 (1904).

CHAPTER XIII.

LARCENY.

SECTION 1.—PROPERTY THE SUBJECT OF LARCENY.

It is to be known that theft is, according to the laws, the fraudulent handling of another person's property with the intention of stealing, against the will of the lord whose property it is. I say with the intention, for without the intention of stealing it is not committed.

Bracton, f. 134b.

The definitions of larceny are none of them complete. Mr. East's is the most so; but that wants some little explanation. His definition is "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." This is defective in not stating what the definition of "felonious" in this definition is. It may be explained to mean that there is no color of right or excuse for the act, and the intent must be to deprive the owner, not temporarily, but permanently, of his property.

Parke, B., in *Reg. v. Holloway*, 2 Car. & K. 946 (1849).

ANONYMOUS.

(King's Bench, 1478. Y. B. 18 Edw. IV, 8, pl. 7.)

A man was indicted in the King's Bench for having, on Monday next before the Feast of the Purification of the Blessed Virgin Mary, 10 Edw. IV, at C., in the county of M., with force and arms broken into a dove cote and feloniously taken twenty young pigeons. And this was adjudged a good indictment, notwithstanding the exception * * * because the property in the said pigeons would be at all times in him to whom the dove cote belonged, inasmuch as they could not go out, but he could take them at any time at his pleasure; but it is otherwise if he were indicted for the taking of old pigeons, because the law does not adjudge the property in them in any one, for they go about the country and he cannot take them at pleasure; and, therefore, if he were indicted for this the indictment is void. Also, if he be indicted for taking pike or tenches out of a pond or trunk feloniously the indictment is good *causa qua supra*, otherwise is it if they

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be taken in the river;¹ the law is the same as to young goshawks which cannot go or fly, hatched in my own park, it is felony, but it is otherwise as to other goshawks; and so note the difference when the property is mine at my pleasure and when it is not.²

REX v. SEARING.

(Court for Crown Cases Reserved, 1818. Russ. & R. 350.)

The prisoner was tried before Mr. Baron Wood, at the Lent Assizes for Hertfordshire, in the year 1818, for larceny, in stealing "five live tame ferrets confined in a certain hutch," of the price of 15 shillings, the property of Daniel Flower.

The jury found the prisoner guilty; but on the authority of 2 East, P. C. 614, where it is said that ferrets (among other things) are considered of so base a nature that no larceny can be committed of them, the learned judge respited the judgment until the opinion of the judges could be taken thereon.

It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoners for 9 shillings.

In Easter Term, 1818, the judges met and considered this case. They were of opinion that ferrets (though tame and salable) could not be the subject of larceny, and that the judgment ought to be arrested.³

¹ Accord: *Rex v. Hudson*, 2 East, P. C. 611 (1781); *State v. Krider*, 78 N. C. 481 (1878).

² "These pheasants, having been hatched by hens, and reared in a coop, were tame pheasants at the time they were taken, whatever might have been their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny." Channell, B., in *Reg. v. Cory*, 10 Cox, C. C. 23 (1864). Accord: *Reg. v. Shickle*, 11 Cox, C. C. 189 (1868).

³ "Under decisions of English and American courts, made upon the common-law definition of larceny, Mr. Bishop classes the following animals, when reclaimed, as the subjects of the offense: Pigeons, doves, hares, conies, deer, swans, wild boars, cranes, pheasants, partridges and fish suitable for food, including oysters. To which might be safely added wild turkeys, geese, ducks, etc., when reclaimed. Of those animals of which there can be no larceny, though reclaimed, he puts down the following: Dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, squirrels, parrots, singing birds, martins, and coons. In the South, squirrels are in common use as food animals, and the hunters of all climates regard bears as good food. Iowa is credited with the decision (*Warren v. State*, 1 G. Greene, 106) that coons are unfit for food, and therefore, by the common law, not the subject of larceny, when reclaimed. Among the colored people of the South the coon, when fat in the fall and winter, is regarded as a luxury, and the Iowa decision would not be regarded by them as sound law or good taste. On the whole subject, see 2 Bishop on Criminal Law (6th Ed.) §§ 757, 781, and notes." English, C. J., in *Haywood v. State*, 41 Ark. 479 (1883).

"Hales, J., * * * is said (Stanford, p. 275) to have 'thought it no felony to take a diamond, rubie, or other such stone (not set in gold or otherwise) because they be not of price with all men, howsoever some do hold them both dear and precious.'" 3 Steph. Hist. Cr. L. 143.

CARVER v. PIERCE.

(King's Bench, 1648. Style, 66.)

Carver brings an action upon the case against Pierce for speaking these words of him, Thou art a thief, for thou hast stolen my dung; and hath a verdict. The defendant moved in arrest of judgment, that the words were not actionable: for it is not certain whether the dung be a chattel, or part of the freehold, and if so, it cannot be theft to take it, but a trespass, and then the action will not lie.

BACON, Justice. Dung is a chattel and may be stolen.

But ROLL, Justice, answered: Dung may be a chattel, and it may not be a chattel; for a heap of dung is a chattel, but if it be spread upon the land it is not, and said, the word thief here is actionable alone, and there are no subsequent words to mitigate the former words, for the stealing of dung is felony if it be a chattel.

BACON, Justice, said: It doth not appear in this case of what value the dung was, and how shall it be known whether it be felony or petty larceny.

To this ROLL answered: The words are scandalous notwithstanding, and actionable, though the stealing of the dung be not felony.

The rule was to move it again Tuesday next.

REX v. WESTBEER.

(King's Bench, 1740. 1 Leach [4th Ed.] 12.)

At the Old Bailey January Session, 1739, Thomas Westbeer was indicted before Lord Chief Baron COMYNS, and Mr. Justice CHAPPLE, for stealing a parchment writing, purporting to be a commission, dated in the reign of Queen Anne, empowering the commissioners therein named (pursuant to an order which had been previously made in chancery, in a cause between Lord Chesterfield and John Cantrell and others) to enter and ascertain the boundaries of the manors of Bradbury and Hartsherne, and to certify how high the water of Furnace Pool ought to be kept, etc. And also one other parchment writing, purporting to be a return made to the said commission. The property was laid to be the goods of our sovereign lord the king, and of the value of four shillings.¹

THE COURT gave no opinion, whether these were properly laid to be the goods of the king, nor whether the law as to this case was altered by 8 Hen. VI, c. 12; but they were unanimously of opinion that these parchment writings concerned the realty, and that therefore the prisoner was not guilty of the felony charged in the indictment.²

¹ Part of this case is omitted.

² In Select Pleas of the Crown (Sel. Soc.) pl. 82, is reported for the year 1200 an appeal for robbery of the title deeds to land.

HOSKINS v. TARRENCE.

(Supreme Court of Indiana, 1840. 5 Blackf. 417, 35 Am. Dec. 129.)

DEWEY, J. This was an action of slander. The words laid in the declaration to have been spoken by the defendant of the plaintiff, among others, are: "He broke into my room and stole the key." Plea, not guilty. Verdict and judgment for plaintiff. There was evidence that the defendant said of the plaintiff: "He broke into a room of my house, and stole the key out of the door." The defendant moved the court to instruct the jury "that the key in the lock of the door of a house, and belonging thereto, is part of the realty, and not the subject of larceny, unless the same is first severed from the realty by one act, and then stolen by another and distinct act." The court refused the charge.¹

It is true that the keys of a house follow the inheritance; and the writers who lay down this doctrine make no distinction between keys in the lock and those in the pockets of their owners. They are, nevertheless, not fixtures, but personal property, which, from a rule of law founded on public convenience, like title papers, go with the land. And as no decision, so far as we know, has as yet ranked them among the articles upon which larceny cannot be committed, and as we see no good reason for carrying the doctrine of exemption farther than it has already gone, we feel at liberty, upon the authority of *Rex v. Hedges*, *supra*, as well as on principle, to decide that as "personal goods" they are within the purview of our statute relative to crime and punishment, and are the subjects of theft. *Rev. St. 1838*, p. 207.

The circuit court committed no error in refusing the instruction to the jury which was asked for by the defendant.

PER CURIAM. The judgment is affirmed, with 1 per cent. damages and costs.

REGINA v. WATTS.

(Court of Criminal Appeal, 1854. 6 Cox, C. C. 304.)

The prisoner, William Mote Watts, was indicted at the Quarter Sessions for the North Riding of Yorkshire, on the 2d of June, 1853, for stealing on the 3d day of May, 1853, a piece of paper, the property of the prosecutor, Francis Patteson, and was convicted. The piece of paper found to have been stolen had written upon it, when taken by the prisoner, as alleged in the indictment, an agreement between the prosecutor and the prisoner, signed by each of them. The agreement could not be produced, but secondary evidence of it was received, from which it appeared that the prisoner contracted thereby to build two cottages for the prosecutor, for a sum specified, accord-

¹ Part of this case is omitted.

ing to certain plans and specifications, and the latter agreed to pay two installments, being part of the price agreed on, at certain stages of the work, and the remainder on completion; and it was stipulated that any alterations that might take place during the progress of the building should not affect the contract, but should be decided upon by the employer and employed, previous to such alterations taking place. Under this instrument the work was commenced and continued. At the time when it was stolen by the prisoner, as alleged, the work was going on under it. Nevertheless it was proved at the trial that when the agreement was stolen the prisoner had been paid all the money which he was entitled to under it, although there was money owing to him for extras and alterations. The agreement was unstamped. The counsel for the prisoner objected, at the close of the case for the prosecution, that from the evidence it was clear that, at the time the piece of paper referred to in the indictment was taken by the prisoner, it was, in reality, a subsisting and valid agreement, and therefore not the subject of larceny (as a piece of paper only) at common law. The question for the opinion of the court is whether, under the circumstances above stated, the prisoner could be lawfully convicted of feloniously stealing a piece of paper, as charged in the indictment. No judgment was passed on the prisoner, and he was discharged on recognizance of bail to appear and receive judgment when required.

This case was before the court on the 12th November, 1853, and was sent back to be restated, and an alteration was made in it to the effect that the agreement was one which required a stamp.¹

Price, for the prosecution. First, this was not a chose in action at all, because whatever was due under the agreement had been paid. 2 Bl. 397.

CROMPTON, J. But the work was still going on.

MARTIN, B. And an action might be maintained upon it for not building according to the specification.

Price. Then the want of stamp prevents it from being a chose in action.

MAULE, J. Strictly speaking, a chose in action is an incorporeal right, and, of course, therefore, cannot be the subject of larceny; but the rule means that those instruments which are the evidence of a chose in action are not the subject of larceny.

Price. When the objection is taken at nisi prius, it is enough to say that the proper evidence of the contract is not produced. *Jardine v. Payne*, 1 B. & Ad. 670. It is unnecessary to say that the unstamped paper is not a chose in action; but in truth it is not, because the stamp laws prevent any court from regarding it as an available security. If

¹ The argument of Bliss for the prisoner and the concurring opinions of Alderson, B. and Crompton, Coleridge, Maule, and Platt, J.J., and the dissenting opinions of Parke, B., are omitted. Wightman, Cresswell, and Williams, J.J., and Martin, B., concurred with the Chief Justice.

the prisoner had been indicted for stealing a valuable security, this unstamped agreement would not have proved it. In *R. v. Hart*, 6 Car. & P. 106, the prisoner was indicted for stealing blank acceptances on unstamped paper; but it was held they were not within the statute, either as bills or orders for payment of money or securities for money, and the charge of stealing the stamps and paper was disposed of on the ground that there was no sufficient taking. Other cases of imperfect securities were: *R. v. Perry*, 1 Car. & K. 725, 1 Cox, C. C. 222, and *R. v. Vyse*, 1 Moo. C. C. 218. In *Perry's Case*, the prisoner was charged with stealing a check, described in another count as a piece of paper, and he was convicted on the latter count.

ALDERSON, B. Because the check was absolutely void, having been issued unstamped beyond the limited distance. It never could be made a good check.

Price. The judges do not appear to have decided that the check was void, but to have thought that, whether it was so or not, the prisoner might be convicted of stealing the paper. *Vyse's Case* is also like this, because there the things stolen were bank notes, which had been paid in London, and which one of the partners of the banking firm was carrying back into the country to be reissued, and it was held that they were properly described as unstamped pieces of paper for the purposes of the indictment, although some of the judges doubted whether they were or were not valuable securities. *R. v. Clark*, R. & Ry. 181, is to the same effect.

MAULE, J. The notes were nothing but paper until reissued, because they derived their whole operation from being delivered to some one.

Price. In a court of justice the writing upon the unstamped paper in the present case bound nobody.

MAULE, J. It is the signature of the parties which binds.

Price. Lastly, even assuming this unstamped agreement to be a chose in action, the prisoner is rightly convicted. All the writers on Criminal Law, in stating the rule that a chose in action is not the subject of larceny, refer to the Year Books (10 Edw. IV, 14a; 49 Hen. VI, fols. 9, 10), as the authority upon which it rests. It appears, however, by reference to those books, that the ground of the rule was that choses in action could not be valued, and at that time there was no felony unless the things stolen were of the value of 12 pence; but, the law as to value being abolished, cessante ratione cessat lex, there may be a difference as to title deeds, which savor of the realty. *R. v. Walker*, Ry. & M. 155. At all events, the thing stolen in this case was a piece of paper; and so the indictment is proved.

Bliss, in reply. The general rule cannot be disputed.

LORD CAMPBELL, C. J. We are all of the opinion that, except so far as the Legislature has interfered with it, the rule is that documents which are the evidence of a chose in action are not the subject of larceny.

Bliss. The cases cited are quite distinguishable. *R. v. Vyse* and *R. v. Clark* were cases of satisfied notes; but here there is no ground for saying that the agreement was at an end.

LORD CAMPBELL, C. J. I am of opinion that this conviction is wrong. I think that the prisoner could not, under the circumstances stated, be indicted for stealing a piece of paper. If the agreement had been stamped, it seems to be allowed, notwithstanding the ingenious argument of Mr. Price, that an indictment for stealing a piece of paper could not be supported, because then it would be what is commonly called a chose in action, and by the common law larceny cannot be committed of a chose in action. Strictly speaking, the instrument, of course, is not a chose in action, but evidence of it, and the reason of the common-law rule seems to be that stealing the evidence of the right does not interfere with the right itself. *Jus non in tabulis*. The evidence may be taken, but the right still remains. At all events, whatever be the reason of the rule, the common law is clear that for a chose in action larceny cannot be supported; and the Legislature has repeatedly recognized that rule, by making special provision with regard to instruments, which are choses in action, and of which, but for those enactments, larceny could not be committed. As to this not being a chose in action, because all that was due had been paid upon it, it appears that the agreement is still executory, and might be used by either side to prove their rights. Then comes the objection as to its not being stamped; but, though it is not stamped, I am of opinion that it is an agreement. There is a very clear distinction between instruments which without a stamp are wholly void, and those which may be rendered available at any moment, by having a stamp impressed upon them. There are many cases in which an unstamped agreement is considered evidence of a right. When the question arises at *nisi prius*, as soon as it appears that the agreement was reduced into writing, parol evidence is excluded, because the written instrument is the proper and only evidence; and *Bradley v. Bardsley*, 14 M. & W. 873, is strong to show that the court considers an unstamped agreement evidence of a right. To an action on an agreement a plea that it was not stamped is clearly bad, for the agreement may be stamped even pending the trial, and may then be given in evidence, as the stamping reflects back to the period of the making of the instrument. I agree that we must look at the state of the instrument at the time of the larceny committed; but it then had a potentiality of being rendered available, and it was evidence of an agreement. It was therefore evidence of a chose in action, and not the subject of larceny.

Conviction reversed.^a

^a Compare *Reg. v. Perry*, 1 Car. & K. 725 (1845).

Conviction of larceny has been upheld for the stealing of the following property:

Illuminating gas, *Reg. v. White*, 6 Cox, C. C. 213 (1853); Commonwealth v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706 (1862); *State v. Wellman*, 34

REGINA v. TOWNLEY.

(Court of Criminal Appeal, 1871. 12 Cox, C. C. 59.)

Case reserved for the opinion of this court by Mr. Justice Blackburn.

The prisoner and one George Dunkley were indicted before me at the Northampton Spring Assizes for stealing 126 dead rabbits.

The evidence showed that Mr. Hollis' keepers, about 8 in the morning on the 23d of September, discovered 126 dead and newly killed rabbits and about 400 yards of net concealed in a ditch, in the forest, behind a hedge, close to a road passing through the forest.

The rabbits were some in bags and some in bundles, strapped together by the legs, and had evidently been placed there as a place of deposit by those who had netted the rabbits.

The keepers lay in wait, and about a quarter to 11 on the same day Townley and a man, who escaped, came in a cab driven by Dunkley along the road. Townley and the man who escaped left the cab in charge of Dunkley, and came into the forest, and went straight to the ditch where the rabbits were concealed, and began to remove them.

The prisoners were not defended by counsel.

It was contended by the counsel for the prosecution that the rabbits on being killed and reduced into possession by a wrongdoer became the property of the owner of the soil, in this case the queen (*Blades v. Higgs*, 7 L. T. [N. S.] 798, 834), and that, even if it was not larceny to kill and carry away the game at once, it was so here, because the killing and carrying away was not one continued act.

1 Hale, P. C. 510, and *Lee v. Risdon*, 7 Taunt. 191, were cited.

The jury, in answer to questions from me, found that the rabbits had been killed by poachers in Selsey Forest, on land in the same occupation and ownership as the spot where they were found hidden.

That Townley removed them, knowing that they had been so killed, but that it was not proved that Dunkley had any such knowledge.

I thereupon directed a verdict of not guilty to be entered as regarded Dunkley, and a verdict of guilty as to Townley, subject to a case for the Court of Criminal Appeal.

It is to be taken as a fact that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them.

Minn. 221, 25 N. W. 395 (1885); *Woods v. People*, 222 Ill. 293, 78 N. E. 607, 7 L. R. A. (N. S.) 520, 113 Am. St. Rep. 415 (1906); water supplied in pipes to consumers, *Ferens v. O'Brien*, 15 Cox, C. C. 332 (1883); intoxicating liquor kept for sale contrary to law, *Commonwealth v. Coffee*, 9 Gray (Mass.) 139 (1857); *State v. May*, 20 Iowa, 305 (1866); implements used for gambling, *Bales v. State*, 3 W. Va. 685 (1868). Contra: *State v. Wilmore*, 9 Ohio Dec. (Reprint) 61 (1883).

Electricity has been made the subject of larceny by statute in some states.

The question for the court is whether on these facts the prisoner was properly convicted of larceny.

The prisoner was admitted to bail.

COLIN BLACKBURN.

No counsel appeared to argue on either side.

BOVILL, C. J. (after stating the facts). The first question that arises is as to the nature of the property. Live rabbits are animals *feræ naturæ*, and are not the subject of absolute property, though at the same time they are a particular species of property *ratione soli*, or rather the owner of the soil has the right of taking and killing them, and as soon as he has exercised that right they become the absolute property of the owner of the soil. That point was decided in *Blades v. Higgs*, *supra*, as to rabbits, and in *Lonsdale v. Rigg*, 26 L. J. 196, Ex., as to grouse. In this case the rabbits, having been killed on land the property of the crown, and left dead on the same ground, would therefore, in the ordinary course of things, have become the property of the crown. But before a person can be convicted of larceny of a thing not the subject of larceny in its original state, as, e. g., of a thing attached to the soil, there must not only be a severance of the thing from the soil, but a felonious taking of it also after such severance. Such is the doctrine as applied to stealing trees and fruit therefrom, lead from buildings, fixtures, and minerals; but, if the act of taking is continuous with the act of severance, it is not larceny. The case of larceny of animals *feræ naturæ* stands on the same principle. Where game is killed and falls on another's land, it becomes the property of the owner of the land; but the mere fact that it has fallen on the land of another does not render a person taking it up guilty of larceny, for there must be a severance between the act of killing and the act of taking the game away. In the present case we must take it that the prisoner was one of the poachers, or connected with them. Under these circumstances we might come to the conclusion that it was a continuous act, and that the poachers netted, killed, packed up, and attempted to carry away the rabbits in one continuous act, and therefore that the prisoner ought not to have been convicted of larceny.

MARTIN, B. I am of the same opinion. It is clear that if a person kills rabbits, and at the same time carries them away, he is not guilty of larceny. Then, when he kills rabbits, and goes and hides them, and comes back to carry them away, can it be said that is larceny? A passage from Hale's P. C. 510—"If a man comes to steal trees, or the lead off a church or house, and sever it, and after about an hour's time or so come and fetch it away, it is felony, because the act is not continued, but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and so it was argued by the Court of King's Bench (9 Car. I), upon an indictment for stealing the lead off Westminster Abbey"—was relied on by the prosecution. There is also a dictum of Gibbs, C. J., to the same effect, in *Lee v. Risdon*, 7 Taunt. 191. I am not insensible

to the effect of those dicta; but here we must take it as a fact that the poachers had no intention to abandon possession of the rabbits, but put them in the ditch for convenience sake; and I concur in thinking that the true law is that, when the poachers go back for the purpose of taking them away, in continuation of the original intention, it does not amount to larceny.

BRAMWELL, B. Our decision does not appear to me to be contrary to what Lord Hale and Gibbs, C. J., have said in the passages referred to. If a man, having killed rabbits on the land of another, gets rid of them because he is interrupted, and then goes away, and afterwards comes back to remove the rabbits, that is a larceny, and so if, on being pursued, he throws them away; and it is difficult to perceive any distinction where the owner of a chattel attached to the freehold finds it on his land severed, and the person who severed it having abandoned it afterwards comes and takes it away. It is in those cases so left as to be in the possession of the true owner, and the act is not, as Lord Hale expresses it, continued. In this case, however, the rabbits were left by the poachers as trespassers in a place of deposit, though it happened to be on the land of the owner; and it is just the same as if they had been taken and left at a public house, or upon the land of a neighbor. If they had been left on the land of a neighbor, or at a public house, could it have been said to be larceny? Clearly not; and, if not, why is it larceny because the poachers left them in a place of deposit on the owner's own land? It seems to me that the case is not within the dicta of Lord Hale and Gibbs, C. J., but that here the act was continuous, and that there was an asportation by the poachers to a place of deposit, where they remained not in the owner's possession.

BYLES, J. I cannot say that I have not entertained a doubt in this case; but upon the whole I think that this was not larceny. The wrongful taking of the rabbits was never abandoned by the poachers, for some of the rabbits were in their bags. It could hardly be said that if a poacher dropped a rabbit, and afterwards picked it up, that could be converted into larceny; yet that would follow if the conviction were upheld.

BLACKBURN, J. I am of the same opinion. Larceny has always been defined as the taking and carrying away of the goods and chattels of another person; and it was very early settled, where the thing taken was not a chattel, as where a tree was cut down and carried away, that was not larceny, because the tree was not taken as a chattel out of the owner's possession, and because the severance of the tree was accompanied by the taking of it away. The same law applied to fruit, fixtures, minerals, and the like things, and statutes have been passed to make stealing in such cases larceny. Though in the House of Lords, in *Blades v. Higgs*, it was decided that rabbits killed upon land became the property of the owner of the land, it was expressly said that it did not follow that every poacher is guilty of larceny, because, as Lord Cranworth said: "Wild animals,

whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels, so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples, which he has gathered from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property; and the same principle is applicable to wild animals." The principle is as old as 11 Year Book, par. 33, where it is reported that a forester who had cut down and carried away trees could not be arraigned for larceny, though it was a breach of trust; but it was said it would have been a different thing if the lord of the forest had cut down the trees and the forester had carried them away. Then that would have been larceny. So that, in the case of wild animals, if the act of killing and reducing the animals into possession is all one and continuous, the offense is not larceny. The jury have found in this case that the prisoner knew all about the killing of the rabbits, and that they were lying in the ditch. It is clear that, during the three hours they were lying there, no one had any physical possession of them, and that they were still left on the owner's soil; but I do not see that that makes any difference. Then there is the statement from Hale's P. C. 510, where it is said that larceny cannot be committed of things that adhere to the freehold, as trees, or lead of a house, or the like, yet that the Court of King's Bench decided that, where a man severed lead from Westminster Abbey, and after about an hour's time came and fetched it away, it was felony, because the act is not continuous but interpolated; and Lord Hale refers to Dalton, p. 166, c. 103. And Gibbs, C. J., expressed the same view very clearly in *Lee v. Risdon*. Now, if that is to be understood as my Brother BRAMWELL explained, I have no fault to find with it; but if it is to be said that the mere fact that the chattel having been left for a time on the land of the owner has thereby remained the owner's property, and that the person coming to take it away can be convicted of larceny, I cannot agree with it as at present advised. If we are to follow the view taken by my Brother BRAMWELL of these authorities, they do not apply here, for no one could suppose that the poachers ever parted with the possession of the rabbits. I agree that, in point of principle, it cannot make any difference that the rabbits were left an hour or so in a place of deposit on the owner's land. The passage from Lord Hale may be understood in the way my Brother BRAMWELL has interpreted it, and, if so, the facts do not bring this case within it.

Conviction quashed.¹

¹ In *Reg. v. Foley*, 26 L. R. (Ireland) 299 (1889), the facts were that Foley, a former tenant, re-entered the premises and cut grass belonging to the landlord. Three days later he again entered, raked the grass, and carted it away. On a case reserved a conviction for larceny of the grass was affirmed;

COMMONWEALTH v. STEIMLING.

(Supreme Court of Pennsylvania, 1893. 156 Pa. 400, 27 Atl. 297.)

Mr. Justice WILLIAMS.¹ It appeared on the trial that Bower, the prosecutor, was the owner of a farm which was crossed by Mahanoy creek. Some distance up the stream coal mines were in operation and had been for many years. The culm and waste from the mines and breaker, which had been thrown into, or piled upon the bank of, the creek, had been carried down the stream by the current and the floods, and deposited in the channel and along the shores in considerable quantities. This material, having been abandoned by its original owners, belonged to him on whose land the water left it. The water, dropping the heavy pieces first and carrying the smaller particles and dust along in the current, served as a screen; and as the result of this process considerable quantities of coal suitable for burning were lodged along the channel and the banks of the stream throughout its course over the prosecutor's farm. The defendant, descending the stream with a flatboat, entered upon the lands of Bower and began to gather coal from the surface. He was provided with a scoop or shovel made of strong wire or iron rods, with which he gathered up the coal. The sand and gravel passed through the meshes of the scoop, leaving the pieces of coal within it. When the gravel was all sifted out, the cleaned coal was emptied upon the flatboat. This process was continued until a boat load was obtained. The boat was then towed or pushed to some bins on the shore opposite to Bower's house, and the coal was transferred from the boat to the bins. This was repeated until from 8 to 12 tons of coal had been gathered, cleaned, deposited on the boat, transported to the bins, and unloaded. This coal was afterwards delivered to purchasers, or taken for consumption, from the bins. Here was a taking with intent to carry away and convert, a carrying away, and an actual conversion, which the commonwealth held sustained the indictment for larceny. The learned judge, however, instructed the jury that the process of collecting, cleaning, loading

Palles, C. B., dissenting. Gibson, J., said: "Townley's Case only decides: (1) That, where there is evidence of actual possession continuing, the fact that there is an interval of time between the taking and carrying away does not constitute larceny where the wrongdoer's intention is not abandoned and the transaction is in substance continuous; (2) that chattels may be in the thief's possession, though left on the owner's land. The expressions 'abandon' and 'intention to abandon,' found in the report of Townley's Case, L. R. 1 C. C. R. 315, though not inappropriate when read with reference to the special facts of that case, are liable to misconstruction if employed in reference to such a case as that before us. Where chattels, after severance, are left on the property of the true owner, no matter what the wrongdoer's intention may be, he cannot escape the common-law doctrine, if his possession is not in fact continuous. Continuity of intention is not the equivalent of continuity of possession. The transaction here was not continuous, and the conviction is right."

¹ Part of the opinion is omitted.

upon the flatboat, transporting to the bins, and unloading the coal into them must be regarded as one continuous act, like the act of him who tears a piece of lead from a building and carries it off, or who, passing an orchard, plucks fruit and takes it away, and that the defendant was, therefore, a trespasser only. The distinction in the mind of the learned judge was that between real and personal estate. The coal lying upon the surface he held to be real estate. The lifting it up in the shovel was on this theory a severance, which forcibly changed its character and made it personal. The loading into the flatboat, the transportation to the bins, and unloading of the boat, all of which acts were done within the lines of the prosecutor's land, and occupied hours of time for each boat load, were so connected with the severance as to make but a single act. For this reason he held that the defendant was guilty of a trespass only. The common law did distinguish between things that are connected with or savor of the real estate and those that are personal goods. An apple growing upon a tree was connected with the land by means of the tree that bore it, and so held to partake of the nature of the land, and to be real estate. One who plucked it from the tree, and at once ate or carried it away, was therefore a trespasser; but if he laid it down, and afterwards carried it away, so that the taking and the asportation were not one and the same act, then, if the carrying away was done *animo furandi*, the elements of larceny were present.

Blackstone tells us, in volume 4, p. 233, of the Commentaries, that larceny cannot be committed of things that savor of the realty, because of "a subtilty in the legal notions of our ancestors." He then explains the subtle distinction as follows: "These things (things that savor of the realty) were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from their proprietor in their newly acquired state of mobility." But he explains that, if the act of severance and that of carrying away be separated, so that they do not constitute "one and the same continued act," the subtle distinction between personal goods and those that savor of the real estate ceases to protect the wrongdoer from a criminal prosecution, and a charge of larceny can be sustained. The question whether this coal, lying loose upon the surface, like other drift of the stream, was real or personal estate, does not seem to have been raised in the court below, and it is not before us.

The real question presented is whether this case upon its facts is one for the application of the common-law rule. Have we here a severance and an asportation that constitute "one and the same continuous act?" If the picking of the coal from the surface be

treated as an act of severance, we have next the act of cleaning and sifting, then the deposit of the cleaned coal upon the flatboat little by little, then the transportation of the boat load to the bins, and then the process of shoveling the coal from the boat into the bins.

The acts, occupying considerable time for each boat load, were all done within the inclosures of the prosecutor. It is as though one should come with team and farm wagon into his neighbor's corn field and pluck the ears, load them into the wagon, and, when the wagon would hold no more, draw the corn away to his own corn house, and then return again, and continue the process of harvesting in the same manner until he had transferred his neighbor's crop to his own cribs. If such acts were done under a bona fide claim of title to the crop, they would not amount to larceny; but, if done *animo furandi*, all the elements of larceny would be present. In the case before us it is conceded that the coal belonged to Bower, and was in his possession as part of his real estate. The defendant entered his lands for the purpose of collecting coal and carrying it away. He makes no bona fide claim of title, no offer to purchase, sets up no license, but rests on the proposition that, like the man who plucks an apple from a tree and goes his way, he is liable only as a trespasser. If this be true, he could gather the coal from Bower's land as often as the stream made a sufficient deposit to justify the expenditure of time necessary to gather, clean, transport, and put it in bins. Upon the same principle he might gather all the crops growing on Bower's farm as they matured, and by hauling each load away when it was made up, defend against the charge of larceny, on the ground that the gathering from the tree, the stalk, or the hill, the loading into wagons, and the carrying of the loads away, though occupying hours for each load and many days for the crop, was "one and the same continuous act" of trespass. We cannot agree to such an extension of the common-law rule, but are of the opinion that this case should have gone to the jury on the existence of the *animo furandi*.²

² See, also, *Bradford v. State*, 6 Lea (Tenn.) 634 (1881).

There can be no larceny of abandoned property. In *Sikes v. State* (Tex. Cr. App.) 28 S. W. 688 (1894), a conviction of the larceny of two turbine wheels that had been left by the owner for nine years on the right of way of the carrier by whom they had been transported, was upheld; and in *Reg. v. Edwards*, 13 Cox, C. C. 384 (1877), the Court for Crown Cases Reserved affirmed a conviction for the larceny of three pigs, which having been bitten by a mad dog, had been killed and buried by the prisoner for the owner.

Estrays are subjects of larceny. See *Crockford v. State*, 73 Neb. 1, 102 N. W. 70 (1905).

SECTION 2.—THE OWNERSHIP OF THE PROPERTY.

HAYNES' CASE.

(Leicester Assizes, 1577. 12 Coke, 113.)

Note, in the Lenten Assize, held at Leicester 11 and 12 Jac., the case was, that one William Haynes had digged up the several graves of three men and one woman in the night, and had taken their winding sheets from their bodies, and buried them again; and it was resolved by the justices at Serjeants Inn, Fleet street, that the property of the sheets remain in the owners, that is, in him who had property therein, when the dead body was wrapped therewith, for the dead body is not capable of it, as in 11 Hen. IV. If apparel be put upon a boy, this is a gift in the law, for the boy hath capacity to take it; but a dead body being but a lump of earth hath no capacity; also it is no gift to the person, but bestowed on the body for the reverence towards it, to express the hope of resurrection. Also a man cannot relinquish the property he hath to his goods, unless they be vested in another; and accordingly at the said assizes, he was severally indicted for taking each of these sheets: and the first indictment was of petty larceny, for which he was whipped: and at the same assizes he was also indicted for the felonious taking the three other sheets, for which he had his clergy, and so escaped the sentence of death, which he well deserved, for this inhuman and barbarous felony.¹

ANONYMOUS.

(Common Pleas, 1510. Keilw. 160, pl. 2.)

REDE, C. J., said, that if one rob me of my goods and another rob him of the same goods, I have an appeal of robbery against the first that robbed me, and against the second also, for the property in the goods was at all times in me.²

¹ St. 1 Jac. I, c. 12, made it felony to steal bodies for purposes of witchcraft.

² Part of this case is omitted.

WARD v. PEOPLE.

(Court of Errors of New York, 1843. 6 Hill, 144.)

Ward was indicted for petit larceny in stealing a quantity of butter, stated in the indictment to have been the property of J. Flagg. Flagg testified that he was the owner of the butter which was stolen from his possession, and that he bought it of the master of a canal boat. Ward thereupon proposed to ask the witness whether he did not steal the butter on board the boat, or whether he and the master of the boat did not steal it together, which question was objected to by the public prosecutor and overruled by the court.¹

WALWORTH, Chancellor. The objection was properly sustained upon the ground that the answer to the question was not relevant to the matter of the issue, as it was not material to know whether Flagg became possessed of the butter wrongfully or otherwise. The plaintiff in error was therefore rightfully convicted, * * * and the judgment of the court below should be affirmed.

FOSTER, Senator, said, among other things, that the Supreme Court erred in overruling the question put to Flagg. Conceding that the witness might have refused to answer, because of the danger of exposing himself to criminal punishment, was this a ground upon which either the court who tried the cause or the public prosecutor could interfere? No. The privilege was that of the witness, and he alone had the right to avail himself of it. Nor was the question irrelevant. It called for an answer which might have gone far towards discrediting Flagg with the jury. Besides, it was relevant by way of disproving a material allegation in the indictment, viz., that the article stolen was the property of Flagg. If he had nothing but a possession acquired by theft, the property was not in him, but remained where it was before the theft was committed. *Commonwealth v. Morse*, 14 Mass. 217. An act of this kind, so far from divesting the property of the owner, does not even change the possession, in contemplation of law. Per Gould, J., in *The King v. Wilkins*, 1 Leach's Cr. Law, 520, 522. It is true the proposition is laid down by East and some other elementary writers of high repute, that "if A. steal goods of B., and after C. steal the same goods from A., C. is a felon both as to A. and B.; and he may be indicted of stealing the goods of B." 2 East's Cr. Law, p. 654, c. 16, § 90. East cites Hale, who states the proposition thus: "If A. steals the horse of B., and after C. steals the same horse from A., in this case C. is a felon both as to A. and as to B., for by the theft by A., B. lost not the property, nor in law the possession of the horse or other goods; and therefore in that case C. may be appealed of felony by B., or indicted of felony, quod cepit et asportavit the horse

¹ The statement is abridged from the opinion of Walworth, Ch., and part of the opinion is omitted.

of B." 1 Hale's P. C. 507. The single expression made use of by these authors, that "C. is a felon both as to A. and B.," may indeed furnish an inference favorable to the doctrine maintained by the court below; but if we take the whole passage together, especially as quoted from Hale, and construe it in reference to the leading idea which the writer intended to illustrate, it furnishes no sufficient warrant for saying that, in the instance put, C. might be indicted and convicted as for stealing the property of A. On the contrary, Hale expressly affirms that B. "lost not the property, nor in law the possession"; and this accords with all just views of the nature of property and the mode of its acquisition. I have been unable to find any adjudged case where an indictment for larceny has been sustained which alleged the property to be in one who had himself stolen it, and who had no other pretence of right to the possession. Nor do I believe that such a doctrine can be established without interfering with some of the most familiar principles of the common law.

I think the judgment of the court below should be reversed.

On the question being put, "Shall this judgment be reversed?" the members of the court voted as follows:

For reversal: Senators BARTLIT, DIXON, FOSTER, STRONG, and WRIGHT—5.

For affirmance: The CHANCELLOR, and Senators BOCKEE, DENNISTON, FRANKLIN, HARD, LAWRENCE, LOTT, MITCHELL, PLATT, PORTER, PUTNAM, RHODES, SCOTT, and SCOVIL—14.

ANONYMOUS.

(King's Bench, 1429. Y. B. 7 Hen. VI, 42, pl. 18.)

It was said if I bail certain goods to you to keep and afterward I feloniously retake them, I shall be hanged, notwithstanding the property was in me. And NORTON said that this was law.¹

HENRY v. STATE.

(Supreme Court of Georgia, 1900. 110 Ga. 750, 36 S. E. 55, 78 Am. St. Rep. 137.)

LEWIS, J. Sherman Henry was placed upon trial in the city court of Albany, upon an accusation charging him with entering the dwelling house of one Temple Mack with intent to steal, and with wrongfully, fraudulently, and privately taking and carrying away therefrom, with intent to steal the same, one suit of clothes and one bicycle, of the value of \$15, the personal property of said Mack. To this

¹ Part of this case only is printed.

accusation he pleaded not guilty. Briefly stated, the following is the substance of the testimony introduced on the trial: Tempie Mack, the prosecutrix, testified that the accused came to her to engage board. She replied to him that he would have to pay her in advance, as she had lost so much by boarders. Accused replied that he had a trunk full of clothes and a bicycle, and that he would deliver them to her as security for the board. This conversation took place during the day, and that night the accused came back to the home of the prosecutrix, bringing with him his trunk and bicycle, and said: "Here is a suit of clothes that cost me \$8, and a bicycle, that I turn over to you as security for my board." She accordingly received these chattels, and had them placed in a room in her house occupied by her son. The accused also was assigned to this room, where he lodged as a boarder. He kept the key to his trunk, wore the clothes, and rode the bicycle occasionally. In the trunk was a new suit of clothes. He agreed to pay \$2 per week for board, and he remained in the house as a boarder a little over three weeks, for which he was due \$7. A demand was made on him for the money. He left the house, leaving the bicycle and trunk therein. Two or three days afterward the landlady missed the bicycle. She then examined the trunk, and found the new suit of clothes had also been taken away. It further appeared from the testimony that the accused had sold the bicycle, and was wearing the new suit of clothes in another place, where he was engaged in work. The accused introduced no evidence, but made a statement, in which he admitted that he told the landlady his trunk and clothes would be responsible for his board, but denied delivering them to her, stating that he kept the key to his trunk, wore his clothes, and rode his bicycle whenever he wished; said he did not intend to steal anything, but he put on the new suit of clothes to attend to a job in Arlington, where he was working when arrested, and simply desired to make some money so that he could pay his board. The judge of the city court, before whom the case was tried without a jury, after hearing the evidence, found the accused guilty, whereupon he made a motion for a new trial, on the general grounds that the verdict was contrary to law and evidence. To the judgment of the court overruling this motion the accused excepts.

There can be no question about the soundness of the proposition that property stolen from a bailee may be charged in an indictment to be his property, and authorities have even gone to the extent of holding that property stolen from one who had himself stolen it could be alleged as his. It is equally true that property in the hands of a bailee may be stolen by the general owner. Clark's Criminal Law, 216-7; 18 Am. & Eng. Enc. L. 598, 599. In the case of *Wimbish v. State*, 89 Ga. 294, 15 S. E. 325, it was decided by this court that "the ownership of personal property, in an indictment for larceny, may be laid in a bailee having possession of the property when

it was stolen, though the bailment was gratuitous." In *Davis v. State*, 76 Ga. 721, it appears that the accused was indicted for obstructing an officer in the execution of legal process. It seems that, after a levy of a fi. fa. by the sheriff, the defendant in fi. fa. privately took and carried the property levied upon to an adjoining county. It was held by a majority of this court that this did not constitute the offense with which he was charged, and on page 722, Justice Blandford says: "In this case that which the plaintiffs in error did was not to oppose the officer, but it was to defeat the execution of the process by committing the crime of simple larceny. * * * The plaintiffs in error should have been indicted for simple larceny, and not for the offense for which they were indicted." From these principles it necessarily follows that, when property has been delivered by the owner to one as a pledge to secure a debt, the pledgee has sufficient interest in the same to maintain a prosecution against any one, even the general owner, by charging that the property belonged to him, the pledgee. We do not understand, however, that this principle is denied. Counsel for plaintiff in error seeks a reversal in this case upon the idea that the testimony does not show such a delivery of the property in question as would constitute a valid pledge in law. We think there is sufficient testimony for the judge to infer an actual delivery by the accused of this property as security for the payment of his board. The fact that he was permitted to use it does not deprive the pledgee in this case of the right to its custody and control. Nothing can be gathered from the evidence in the record to indicate that she ever consented to such a use or disposition of the same as to absolutely deprive her of such possession. A portion of the property pledged was actually sold to another party by the pledgor without her knowledge and consent; and the circumstances developed by the evidence touching the manner of its disposition by the pledgor were amply sufficient for the judge to infer that he had a fraudulent purpose of depriving his creditor of this security. This identical question was made and passed upon by the Supreme Court of Iowa in the case of *Bruley v. Rose*, reported in 57 Iowa, 651, 11 N. W. 629. It was there decided: "A pledgee has a special property in the thing pledged, and a pledgor who takes the property from the pledgee's possession with the felonious design of depriving such pledgee of his security may be guilty of larceny." In that case it appeared that Bruley had been charged with larceny of a span of horses which he had bought from Rose. For these horses Bruley was indebted to Rose in the sum of \$15.60, and to secure the payment of this balance it was claimed that Bruley delivered the horses to Rose as a pledge, and afterwards gained possession of them under false pretenses and with the felonious design of depriving him of his security. It appeared that Rose did give him permission to take the horses for a particular purpose. It was accordingly held that,

if he took them for a fraudulent purpose, he was guilty of the offense of larceny.

Applying these principles to the facts in this case, we think the court did right in overruling the motion for a new trial.¹

Judgment affirmed. All concurring, except FISH, J., absent.

ANONYMOUS, 1443.

(Fitzherbert, Abr. Corone, 455.)

Note.—By FORSTER, that a woman cannot steal the goods of her husband. PORTER concurred.

REGINA v. KENNY.

(Court of Criminal Appeal, 1877. 13 Cox, C. C. 397.)

Case reserved for the opinion of this court by the Recorder of Chester.

At the Quarter Sessions for the city and borough of Chester and county of the same city, held before me on Monday, the 8th of January, 1877, William Edward Kenney was tried upon an indictment which charged him in the first count with stealing, on the 26th of August, 1876, certain money to the amount of £143, one purse, one silver watch, one child's cloak, one scarf, one American box, one prayer book, two money bags, and other articles of the moneys, goods, and chattels of Edward Gurn, and in the second count with feloniously receiving on the day and year aforesaid the moneys, goods, and chattels aforesaid, well knowing the same to have been feloniously stolen.

The counsel for the prosecution relied on the second count of the indictment and contended, on the authority of the cases of *Reg. v. Deer*, L. & C. 240, 9 Cox, C. C. 225, and *Reg. v. Featherstone*, Dears. C. C. 369, 6 Cox, C. C. 376, that the wife by adultery with the prisoner in August, at Chester, "determined her quality of wife," and in then converting her husband's goods to her own use, was guilty of larceny, and that the prisoner consequently could be guilty of receiving.²

KELLY, C. B. I am of the opinion that the conviction must be quashed. This is not a case of stealing; but the prisoner has been convicted of receiving the property well knowing it to have been stolen. It may well be that when a wife has taken away the goods

¹ Accord: *State v. Nelson*, 36 Wash. 126, 78 Pac. 790, 68 L. R. A. 283, 104 Am. St. Rep. 945 (1904). Compare *State v. Mazyck*, 3 Rich. Law (S. C.) 291 (1832); *Adams v. State*, 45 N. J. Law, 448 (1883).

² Part of this case is omitted.

of her husband with a view to an ulterior adulterous intercourse, and her adulterer has participated in the act of taking them away, he may be indicted for larceny. This view seems to have passed through the mind of Lord Campbell, C. J., in *Reg. v. Featherstone*; but there is nothing in that case to show that a wife can be indicted for stealing the property of her husband. In the present case the prisoner is not convicted for stealing the property of the husband and it is possible, if he had been, the question might have arisen whether he could have been convicted upon the evidence. I am far from saying that he could not. That is not the case here; but the prisoner has been convicted of receiving, and the case fails in showing that the property could have been stolen by any other person than the prosecutor's wife. By the law of England a wife cannot steal her husband's property. If the wife has not stolen the property, there was no evidence of the property having been stolen at all, and therefore the conviction of the prisoner for receiving the property, well knowing it to be stolen, cannot be sustained.

LUSH, J. I am of the same opinion. The property, if stolen in this case, must have been stolen by the wife. It is admitted that the wife did not steal the property when she left Burslem, as a wife cannot steal her husband's property, and they are one person in the eye of the law, and neither can be a witness for or against the other in criminal proceedings. At what time, then, did she become a thief? It is said when she became an adulteress. But how can that be? Adultery affords ground for a divorce, but the mere act of adultery does not make a difference in the status of husband and wife per se, and constitute the wife a thief if she takes away her husband's property. Therefore, if the property was not stolen by the wife in this case, the prisoner could not be guilty of receiving it well knowing it to be stolen.²

Conviction quashed.³

² Mellor, J., and Huddleston, B., delivered concurring opinions, and Denman, J., concurred.

The law has been changed in England by statute. See *Reg. v. Streeter*, post, p. 543.

³ Accord: *State v. Banks*, 48 Ind. 197 (1874). In *Beasley v. State*, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418 (1894), it was held that under the statutes enabling a married woman to hold property, the husband could be convicted of larceny of the wife's goods. Contra: *Thomas v. Thomas*, 51 Ill. 162 (1869); *State v. Parker*, 3 Ohio Dec. (reprint), 551 (1882).

REX v. BRAMLEY.

(Court for Crown Cases Reserved, 1822. Russ. & R. 478.)

The prisoner was tried upon a charge of burglary, before Mr. Clarke, the king's counsel, at the Spring Assizes for the county of Derby, in the year 1822.

The indictment charged the prisoner with a burglary in the dwelling house of one Thomas Noon, and with stealing a box, two purses, £22. 10s. in silver, 6s. 3d. in copper, a promissory note for the payment of £10, and 18 promissory notes for the payment of £1 each, the property of the said Thomas Noon. In another count the property was stated to belong to Sarah Sisson, Ann Fretwell, and Ann Noon.

The box and the other articles (all of which were in the box when taken by the prisoner) were the property of a Female Friends' Society, established under St. 33 Geo. III, c. 54, and the rules, orders, and regulations of which had been exhibited to, and allowed and confirmed by, the sessions, as directed by that statute. The society held their meetings at a public house kept by Thomas Noon, the person mentioned in the indictment; and the funds of the society were kept in the box, which, with the funds it contained, was always deposited in a bed chamber in the house of Thomas Noon after the meetings of the society had ended. It was directed by the rules of the society that the box should remain in the custody of the landlord of the house, or any other person whom the society should appoint; he being responsible for whatever effects were lodged therein.

The persons in whom the property was laid in one of the counts of the indictment, namely, Sarah Sisson, Ann Fretwell and Ann Noon, were stewardesses of the society, appointed according to its rules. The box (as directed also by the rules of the society) had three different locks upon it, and each stewardess had one key. The stewardesses were (by the same rules) to serve for one year, and then to resign their keys, cash, and books to the new stewardesses.

The society met on the evening of the night in which the offense was committed, and the box with the funds in it was, after the meeting broke up, deposited in the usual place in Thomas Noon's house, from whence it was afterwards taken by the prisoner, who gained admission to the chamber by means of a ladder and breaking open the window.

The prisoner had been for some time a member of the society. One of the rules of the society was that each member should pay sixpence to the stock every fourth Monday, and that if a member failed to pay for four successive nights she should be excluded. The prisoner had failed to pay for four successive nights, the last of which was the night the property was taken: but no order for excluding her had been made by the society.

The prisoner was convicted, but a case was reserved for the opinion of the judges upon the question whether, considering the situation in which the prisoner stood with respect to this property, the conviction was proper.

In Easter Term, 1822, the judges (ten of them being present) were clear that, as the landlord was answerable to the society for the property, the conviction was right.

REX v. WILLIS.

(Court for Crown Cases Reserved, 1832. 1 Mood. 375.)

The prisoner, the wife of John Willis, was tried and convicted before Mr. Justice Park, at the Spring Assizes for the county of Wilts, in the year 1833, for stealing 25 sovereigns, 10 half sovereigns, 8 half crowns, and 40 shillings, the property of William Orchard and 30 or 40 others, and amongst them the prisoner's husband, all of whom were named in the indictment.

This was a case of a friendly society held at the public house kept by the prisoner's husband, he being a member of the society, and the box containing the property was always left in the house of the husband of the prisoner; but the box had four locks, kept by the stewards, of whom he was not one.

The facts of the case were quite clear, the wife having broken open this box and stolen a great deal of money to pay some debts of a former husband, and the jury convicted her to the learned judge's satisfaction as to the facts; but the learned judge thought it right to ask the opinion of the judges whether a wife can be convicted of larceny in stealing money in which her husband has a joint property, and deferred the sentence.

The learned judge referred the judges to 1 Hale, P. C. 514, Russell on Crimes, p. 19, Rex v. Bramley, Russ. & Ry. 478, and to the first case in the Old Bailey Sessions Papers for the January Sessions, 1818, tried before the learned judge, in the presence of Lord Tenterden, then Mr. Justice Abbott.

In Easter Term, 1833, this case was considered at a meeting of the judges, and they were of opinion that the conviction was wrong, and the prisoner was discharged.

SECTION 3.—THE CAPTION AND ASPORTATION.

CHERRY'S CASE.

(Court for Crown Cases Reserved, 1781. 2 East, P. C. 556.)

William Cherry was indicted for stealing a wrapper and some pieces of linen cloth; and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid lengthway in a wagon, that the prisoner set up the wrapper on one end in the wagon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken anything. All the judges agreed that this was no larceny, although his intention to steal was manifest; for a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were, and the felon must, for the instant at least, have the entire and absolute possession of them.¹

REGINA v. SIMPSON.

(Court for Crown Cases Reserved, 1854. 1 Dears. 421.)

The following case was reserved for the opinion of the Court of Criminal Appeal by W. H. Bodkin, Esq., acting as assistant judge of the Middlesex Sessions.

William Simpson was tried before me at the Sessions of the Peace for the county of Middlesex, in July, 1854, upon an indictment which charged him with having stolen from the person of Michael Mapper a gold watch and chain, his property. The watch was carried by the prosecutor in the pocket of his waistcoat, and the chain, which was at one end attached to the watch, was at the other end passed through the buttonhole of his waistcoat, where it was kept by a watch key, turned so as to prevent the chain slipping through. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain out of the buttonhole; but his hand was seized by the prosecutor's wife, and it then appeared that, although

¹ In the conference on this case, Mr. Baron Eyre mentioned a case before him where goods in a shop were tied to a string which was fastened by one end to the bottom of the counter, a thief took up the goods and carried them away towards the door as far as the string would permit, and this he held not to be a severance, and consequently no felony, 2 East, P. C. 556. And the principle of this case was recognized in Wilkinson's Case, 1 Hale, 508, where one had his keys tied to the strings of his purse in his pocket, which the prisoner attempted to take from him and was detected with the purse in his hand, but the strings of the purse still hung to the owner's pocket by means of the keys, and this was ruled to be no asportation; for the purse could not be said to be carried away, as it still remained fastened to the place where it was before. Leach, C. C. 321, note.

the chain and watch key had been drawn out of the buttonhole, the point of the key had caught upon another button, and was thereby suspended. It was contended for the prisoner that he was guilty of an attempt only; but I thought that, as the chain had been removed from the buttonhole, the felony was complete, notwithstanding its subsequent detention by its contact with the other button. The jury found the prisoner guilty of the felony; and, a former conviction having been proved, he was sentenced to penal servitude for four years. The execution of the sentence was respited, and the prisoner was committed to the House of Correction, Coldbath Fields, where he now is. I have to pray the judgment of this honorable court whether the facts above stated justify the conviction in point of law.

This case was argued on the 11th of November, 1854, before JERVIS, C. J., ALDERSON, B., COLERIDGE, J., MARTIN, B., and CROWDER, J.

Payne appeared for the crown, and Parry for the prisoner.

Parry, for the prisoner. The conviction was wrong. There may have been a simple larceny, but the asportation was not sufficient to warrant a conviction for stealing from the person. The watch chain, though drawn out of the buttonhole, caught on the button, and the property never was entirely severed from the prosecutor's person.

ALDERSON, B. Whilst it was between the button and the buttonhole, where was it?

Parry. It was about the person of the prosecutor. The watch always remained about his person, and its ultimate condition was that it was suspended from the button. It never was finally and entirely removed from the person of the prosecutor. In *Rex v. Wilkinson*, 1 Hale, P. C. 508, where a thief took from the pocket of the owner a purse, to the strings of which some keys were tied, and was apprehended with the purse in her hand, but still hanging by means of the keys to the pocket of the owner, it was ruled not to be larceny, for the prosecutor had still, in law, the possession of the purse, and *licet cepit non asportavit*.

COLERIDGE, J. In that case there never was a severance, here there was, and the case expressly speaks of the "subsequent detention" of the chain.

Parry. It is not necessary for me to go so far as that case, because it may be conceded that in this case there was a sufficient asportation to support a charge of simple larceny.

ALDERSON, B. The nearest case to the present one seems to be *Rex v. Thompson*, 1 Moo. 78.

Parry. In that case a pocketbook was drawn by the prisoner out of the owner's inside coat pocket, and lifted one inch above the top of the pocket, and then, the hand of the thief being caught, it fell back into the pocket, and, though all the judges held it larceny, they were divided whether it was a stealing from the person, as the

pocketbook remained about the person of the owner; and the majority of the judges held that it was not.

ALDERSON, B. How do you distinguish this case from *Rex v. Lapier*, 1 Leach, C. C. 60, in which the earring was torn from a lady's ear and fell upon her curl?

Parry. There the forcing it from her ear was a severance from her person, but I contend that in this case there was no actual severance. There is a case of *Rex v. Farrell*, 1 Leach, C. C. 362, where it appeared that the prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could remove it from the spot where it lay; and the judges were of opinion that the offense of robbery was not completed. All the cases show the wide distinction between a simple larceny and a stealing from the person. The distinction is one which ought to be considered strictly in favor of a prisoner, and, although this case may be on the very confines of a severance, I contend that no actual severance ever took place.

Payne, for the crown, was not called upon.

JERVIS, C. J. We all are of opinion that the conviction was right. This case is in no respect like that mentioned by Lord Hale, where the prisoner took the purse attached by its strings to the keys, which entangled in the pocket of the prosecutor. In that case there was at no moment the slightest severance from the person; but this is precisely similar to *Lapier's Case*, in which the jewel was torn from the ear of the prosecutrix and dropped amongst her curls. The ear in *Lapier's Case* is like the buttonhole in this, and the curl is like the button below. The watch was no doubt temporarily, though but for one moment, in the possession of the prisoner. In *Thompson's Case* there seems to have been some confusion in the use of the expression "about the person." The words of the act are "from the person," and, with submission to the majority of the judges who held the asportation in that case not to be sufficient, I think the minority were right. The judges in that case may have thought that the outer coat which covered the pocket formed a protection to the pocketbook; but we must not fritter away the law by refining upon nice distinctions in a way to prevent our decisions from being consistent with common sense.

ALDERSON, B. To constitute the offense there must be a removal of the property from the person; but a hair's breadth will do.

The other learned judges concurred.

Conviction confirmed.¹

¹ Accord: As to simple larceny, *Eckels v. State*, 20 Ohio St. 508 (1870); *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517 (1872); *State v. Chambers*, 22 W. Va. 779, 46 Am. Rep. 550 (1883); *Files v. State*, 36 Tex. Cr. R. 206, 36 S. W. 93 (1896).

REGINA v. WALLIS.

(Cambridgeshire Assizes, 1848. 3 Cox, C. C. 67.)

The indictment charged the prisoner with stealing five pints of porter, the property of the Eastern Counties Railway Company, at Cambridge. The evidence showed that the prisoner had made a hole in the barrel through which the porter flowed into a can on the ground, and that a witness rushed in and snatched up the can while the porter was running into it in the presence of the prisoner.

At the close of the case for the prosecution—

Naylor, for the prisoner, submitted that there was no sufficient *asportavit*; there was a stealing and taking, but no carrying away. *R. v. Cherry*, 2 East, P. C. 556. So in a case at Cambridge, where a man indicted for horse-stealing had his hand on the halter for the purpose of leading him away, the judge held that not to be a sufficient *asportavit*. If the prisoner were answering a charge of malicious injury to property, the answer would be that there was a can there for the purpose of carrying the beer away.

COLTMAN, J. I think there was a sufficient *asportavit* of what was run out, but I will reserve the point.

Wells, for the prosecution.

Verdict—Guilty.

REGINA v. WHITE.

(Court of Criminal Appeal, 1853. 6 Cox, C. C. 213.)

The prisoner was indicted at the last Quarter Sessions for Berwick-upon-Tweed, for stealing 5,000 cubic feet of carburetted hydrogen gas, of the goods, chattels, and property of Robert Oswald and others. Mr. Oswald was a partner in the Berwick Gas Company, and the prisoner, a householder in Berwick, had contracted with the company for the supply of his house with gas, to be paid for by meter. The meter, which was hired by the prisoner of the company, was connected with an entrance pipe through which it received the gas from the company's main in the street, and an exit pipe through which the gas was conveyed to the burners. The prisoner had the control of the stopcock at the meter, by which the gas was admitted into it through the entrance pipe, and he only paid the company, and he had only to pay them, for such quantity of gas as appeared by the index of the meter to have passed through it. The entrance and exit pipes were the property of the prisoner. The prisoner, to avoid paying for the full quantity of gas consumed, and without the consent or knowledge of the company, had caused to be inserted a connecting pipe with a stopcock upon it into the entrance and exit pipes, and extending between them; and,

the entrance pipe being charged with the gas of the company, he shut the stopcock at the meter, so that gas could not pass into it, and opened the stopcock in the connecting pipe, when a portion of the gas ascended through the connecting pipe into the exit pipe, and from thence to the burners, and was consumed there, and the gas continued so to ascend and be consumed until by shutting the stopcock in the connecting pipe the supply was cut off. This operation was proved to have taken place at the time specified by the prosecutor. It was contended for the prisoner that, the entrance pipe, into which the gas passed from the main, being the property of the prisoner, he was in lawful possession of the gas by the consent of the company as soon as it had been let into his entrance pipe out of their main, and that his diverting the gas in its course to the meter was not an act of larceny. I told the jury that if they were of opinion, on the evidence, that the entrance pipe was used by the company for the conveyance of the gas by the permission of the prisoner, but that he had not by his contract any interest in the gas or right of control over it until it passed through the meter, his property in the pipe was no answer to the charge, that there was nothing in the nature of gas to prevent its being the subject of larceny, and that, the stopcock on the connecting pipe being opened by the prisoner, and a portion of the gas being propelled through it by the necessary action of the atmosphere, and consumed at the burners, there was a sufficient severance of that portion from the volume of gas in the entrance pipe to constitute an asportavit by the prisoner, and that if the gas was so abstracted with a fraudulent intent he was guilty of larceny. The jury answered the questions put to them in the affirmative, and found the prisoner guilty. I postponed judgment, taking recognizance of bail according to the statute for the appearance of the prisoner at the next sessions to receive judgment if this court should be of opinion that he was rightly convicted.¹

LORD CAMPBELL, C. J. I think that the conviction ought to be affirmed, and that the direction of the learned Recorder was most accurate. Gas is not less a subject of larceny than wine or oil; but is there here a felonious asportation? No one who looks at the facts can doubt it. The gas, no doubt, is supplied to a vessel which is the property of the prisoner; but the gas was still in the possession of the company. Then, being in the possession of the company, and their property, it is taken away *animo furandi* by the prisoner. If the property remains in the company until it has passed the meter, which is found, to take it before it has passed the meter constitutes an asportation. If the asportation was with a fraudulent intent, and this the jury also have found, it was larceny. As to the act of Parliament, the Legislature has, for convenience

¹ The argument of Ballantine for the prisoner is omitted.

sake, added a specific penalty; but that cannot reduce the offense to a lower degree. My Brother MAULE has, however, given a probable explanation of that provision.

PARKE, B., MAULE, J., TALFOURD, J., and MARTIN, B., concurred.
Conviction affirmed.

STATE v. ALEXANDER.

(Supreme Court of North Carolina, 1876. 74 N. C. 232.)

BYNUM, J. The defendant was indicted for stealing a hog running at large in the "range." The hog was found dead, having been shot. Its ears had been cut off, and one of its hams skinned, but the skin had not been severed from the animal; no part being cut off except the ears. There was no evidence that the hog had been killed elsewhere than where found, or had been removed from the spot where it had been killed. There was evidence that the defendant shot the hog and did the skinning. His honor charged the jury that if the defendant shot and skinned the hog, as alleged, and had it under his control, with the intent to steal, there was in law a sufficient asportation, and he was guilty. There is error.

To complete the crime of larceny, it is not sufficient that the defendant had the control of the article—that is, had the power to remove it; but there must be an asportation of the thing alleged to have been stolen. It is true a very slight asportation will be deemed sufficient, yet there must be some removal to complete the offense. The case here shows that there was no removal of the hog, but that it remained in situ, as it had been shot down.¹ In *State v. Jones*, 65 N. C. 395, it was held that the turning of a barrel of turpentine, which was standing upon its head, over upon its side, with a felonious intent, was not such an asportation as constituted larceny. So in *State v. Butler*, 65 N. C. 309, which is a case almost identical with this, it was held that an indictment at common law for stealing a cow is not supported by proof that the cow was shot down and her ears cut off by the defendant with a felonious intent, because there was no asportation of the cow, the thing charged to have been

¹ Accord: *Rex v. Williams*, 1 Moody, 107 (1825); *State v. Seagler*, 1 Rich. Law (S. C.) 30, 42 Am. Dec. 404 (1844); *People v. Murphy*, 47 Cal. 103 (1873); *Williams v. State*, 63 Miss. 58 (1885); *Molton v. State*, 105 Ala. 18, 16 South. 795, 53 Am. St. Rep. 97 (1894).

Compare *Lundy v. State*, 60 Ga. 143 (1878); *Kemp v. State*, 89 Ala. 52, 7 South. 413 (1889); *State v. Gilbert*, 68 Vt. 188, 34 Atl. 697 (1896); *Wilburn v. Territory*, 10 N. M. 402, 62 Pac. 968 (1900).

By statute, in Texas, asportation is not a necessary element of larceny. "It is only necessary that the property stolen should have gone into the possession of the thief. It need not be carried away in order to accomplish the offense." Pen. Code, art. 880. See *Clemmons v. State*, 39 Tex. Cr. R. 279, 45 S. W. 911, 73 Am. St. Rep. 923 (1898).

stolen. These cases and others of our own, as well as English, are decisive. *State v. Jackson*, 65 N. C. 305; *Roscoe*, 570; 2 *Bish. Cr. Law*, 804; 2 *East, P. C.*, 556.

PER CURIAM. Judgment reversed.²

CUMMINGS v. COMMONWEALTH.

(Court of Appeals of Kentucky, 1883. 5 Ky. Law Rep. 200.)

Opinion of the court by Chief Justice HARGIS.³

The appellant, Cummings, according to the evidence, told Sweet he wished to sell him a sow and pigs, and, after agreement on the price went to where a sow and pigs were lying down on the commons and pointed them out as his, and Sweet paid him \$7 in money for them and then drove them off. The sow and pigs belonged to John Flauher, who lived near by.

The appellant seems to have been out of money, and resorted to this means of obtaining some to supply his wants, and then proceeded to the fair.

Having been convicted of the offense of larceny or hog stealing under the statute, the appellant has appealed, and his counsel contend that his offense was not larceny, because there was no asportation by him; but it was obtaining money by false pretenses, if anything.

He was not indicted for obtaining the \$7 for the sow and pigs, but for stealing the sow and pigs. Whether his acts constituted both offenses of larceny of the hogs and obtaining money by false pretenses, for which he might be punished, need not be determined, as there has been no attempt to try him twice for the same acts.

The owner of the sow and pigs never parted with the possession or the property in them. The asportation was by the hand or physical act of Sweet; but the act of felonious taking was that of the appellant committed through Sweet, who was his instrument in committing the trespass upon the property of Flauher.

East, Hale, and Hawkins, who are approved by Archbold, say that if the taking be by the hand of another it is the same as if by the hand of the thief himself. For instance, if the thief procure a child

² "The indictment charges that the prisoners did 'take and carry away' the wheel. To take an article signifies merely to lay hold of, grasp, or seize it, with the hands or otherwise. Webster. With this understanding of the meaning of the term, can it be reasonably said that the act of the prisoners in laying hold of, and with a sledge breaking the wheel in pieces, *animo furandi*, was not a taking of it within the contemplation of the criminal law? We think not. As to the asportation or carrying away of the wheel, * * * we think such removal might be properly inferred from the seizure of the wheel, the mode of breaking it, and the subsequent disposition made of its parts." *Lake, C. J.*, in *Gettinger v. State*, 13 Neb. 308, 14 N. W. 403 (1882).

³ Part of the opinion, relating to another point, is omitted.

within the age of discretion, or an idiot, to steal goods for him, such taking must be charged to him.

It is also a well-established rule, if by artifice or fraud of the thief intending to steal goods the owner is induced to part with their possession merely, and does not part with the title, that this is such a taking as will sustain the charge. It seems, therefore, that instead of fraudulently procuring the owner to part with the possession, the appellant sold the sow and pigs, and caused her removal by Sweet, who was innocent in the trick of placing the asportation on him, and it should be treated as his act through the innocent agency of Sweet, and should be charged to him.

The judgment is therefore affirmed.²

SECTION 4.—THE TRESPASS.

I. POSSESSION NECESSARY FOR TRESPASS TO ATTACH.

It is to be observed that all felonies include trespass, and that every indictment of larceny must have the words "felonice cepit," as well as "asportavit," whence it follows that, if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. 1 Hawkins, P. C. 142.

REX v. DINGLEY.

(King's Bench, 1687. Show. 53.)³

A servant or journeyman employed to sell goods, and receives money for his master's use, sells a considerable quantity and receives 160 guineas for his master, and goes away with 150 when discharged, and lays the 10 in a private place in the chamber where he lay; that being discharged his master's house and service, he afterwards, in the nighttime, breaks open the house and takes the 10 guineas so hid. Held no burglary, for that the taking the money was not felony, for, though his master's money in right, yet his in possession, and the

² Accord: *State v. Hunt*, 45 Iowa, 673 (1877); *Commonwealth v. Barry*, 125 Mass. 390 (1878); *Sikes v. State* (Tex. Cr. App.) 28 S. W. 688 (1894); *Lane v. State*, 41 Tex. Cr. R. 558, 55 S. W. 831 (1900). But see *People v. Gillis*, 6 Utah, 84, 21 Pac. 404 (1899).

³ This case, as printed, is taken from Sir B. Shower's argument in *Rex v. Meers*. In *Bazeley's Case*, Leach, 835, Const read a substantially similar statement of the case from a manuscript report in the possession of the Clerk of Arraignment of the Old Bailey.

p. 100. 11.22 of ...
p. 101. 11.23 of ...
p. 102. 11.24 of ...
p. 103. 11.25 of ...
p. 104. 11.26 of ...
p. 105. 11.27 of ...
p. 106. 11.28 of ...
p. 107. 11.29 of ...
p. 108. 11.30 of ...

11.31. 12.1 of ...
12.2. 12.2 of ...
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12.29. 12.29 of ...
12.30. 12.30 of ...

Possession or custody by servant

Accompanied to servant by master to use his savings
Servant heavily indebted - if he makes improvement the
savings

Assignment to servant by a third person

1. Servant has possession of property
or depends on a third party for property
[Case 108] [Case 421]

2. But when servant depends on a third party for property
[Case 108]

The property is not, directly or indirectly, put out
in the name of the master but is put out
in the name of the servant [Case 421]

When servant is to give from fellow servant, he
is not bound to do so. He is not bound to give the amount
of the fellow servant's debt to the master [p. 20]

(See also [Case 108])
He is not bound to give the amount of the fellow servant's debt
to the master, but he is bound to give the amount of the
fellow servant's debt to the master, if the fellow servant is
bound to do so [p. 20]



first original act is no felony; and if he had laid it underground in the garden, and afterwards come and took it away, this would have been no felony, per WRIGHT, HERBERT, ATKINS, POWELL, and HOLT.

PENNSYLVANIA v. CAMPBELL.

(Westmoreland County Court, 1794. Add. [Pa.] 232.)

Campbell was indicted for stealing a \$50 bank note, the property of Daniel Prosser.

William Todd, having contracted with the Governor for making a certain distance of the state road from Philadelphia to Pittsburg, employed Campbell and Prosser to make the road in part of that distance, and advanced \$60, viz., 10 silver dollars, and a \$50 bank bill. Campbell took up the bill, and Prosser the silver, and they went to a neighboring tavern to get the bill changed for dollars, and then divide the whole money equally between them. Not getting the bill changed at the tavern, Campbell desired Prosser to give him the silver and take the note to another tavern on his way home, and there have it changed, and give him his share afterwards. The note was then lying on the table, with a paper in which it had been given them by Todd. Prosser gave Campbell the silver, and proceeded to take up the note. Campbell bade him stop till he folded it up. While Campbell was folding it up, Prosser turned about to drink with some one in company. Campbell delivered the folded paper to Prosser, who immediately put it in his pocket. When he opened the paper at home, there was no note in it. There was some evidence that Campbell, folding and delivering the paper retained a dirty paper, and that he afterwards proposed to pay Prosser \$30, on his return from Philadelphia, whither he was going, if Prosser would swear that he had lost the note. This Prosser refused to do.

Woods and Young, for the defendant. This can be no larceny; for there never was a possession in Prosser, and there was a joint property. Supposing, therefore, a purloining or embezzling, it is not stealing. The offense, if there be any, is of another kind, a cheat.

Galbraith and Brackenridge, for the state. There is an actual and constructive possession, an absolute and special property; and larceny may be of either.

PRESIDENT. There must be a taking, as well as a carrying away. Unless you can conclude, from the proof, that Campbell had abandoned the possession of the note to Prosser, who, from this abandonment and his undertaking to change the note, became liable to Campbell, or that Prosser, in consequence of his agreement with consent to change, had taken the note, he had no possession. Therefore there can be no taking, and, of course, no larceny. But if the possession was changed from Campbell to Prosser, a taking and a carry-

ing away by Campbell would be larceny, though Prosser had a share in the note; for the change of possession rendered Prosser answerable to Campbell for his half. If the possession of the note was not changed, and if Campbell imposed an empty paper for one inclosing a note, though punishable as a misdemeanor, this is no felony. Therefore, if the proof amount only to this, there can be no conviction on this indictment, although you or I may think that there is little natural difference in the degree of enormity of such misdemeanor and larceny.

The jury found him guilty.

REX v. BULL.

(Court for Crown Cases Reserved, 1797. 2 Leach, 841.)¹

The prisoner, Thomas Bull, was tried at the Old Bailey, January Session, 1797, before Mr. Justice Heath, on an indictment charging him with having stolen, on the 7th of the same month, a half crown and three shillings, the property of William Tilt, who was a confectioner in Cheapside, with whom the prisoner lived as a journeyman; and Mr. Tilt having had, for some time before, strong suspicion that the prisoner had robbed him, adopted the following method for the purpose of detecting him: On the 7th of January, the day laid in the indictment, he left only four sixpences in the till, and, taking two half crowns, thirteen shillings, and two sixpences, went to the house of Mr. Garner, a watchmaker, who marked the two half crowns, several of the shillings, and the sixpences with a tool, used in his line of business, that impressed a figure something like a half moon. Mr. Tilt, having got the money thus marked, went into the house of a Mrs. Hill, and, giving a half crown and three of the shillings to Ann Wilson, one of her servants, and five of the shillings and the other sixpence to Mary Bushman, another of her servants, desired them to proceed to his house and purchase some of his goods of the prisoner, whom he had left in care of the shop. The two women went accordingly to Mr. Tilt's shop, where Ann Wilson purchased confectionery of the prisoner to the amount of five shillings and three-pence, gave him the half crown and three shillings, and received three-pence in change; and Mary Bushman purchased of him articles to the amount of four shillings and sixpence, for which she paid him out of the moneys she had so received, and returned the other shilling to her mistress, Mary Hill. But neither of these women observed whether the prisoner put either the whole or any part of the money into the till or into his pocket. While the women, however, were purchasing these things, Mr. Tilt and Mr. Garner were waiting with

¹ This report is taken from the statement of the case by Const in *Rex v. Bazeley*, Leach, 835. A similar report is given in 2 East, P. C. 572, and it is approved in *Rex v. Headge*, Leach, 1033 (1809), and *Commonwealth v. Ryan*, 155 Mass. 523, 30 N. E. 364, 15 L. R. A. 317, 31 Am. St. Rep. 560 (1892).

a constable at a convenient distance on the outside of the shop door; and, when they observed the women come out, they went immediately into the shop, where, on examining the prisoner's pockets, they found among the silver coin, amounting to fifty-three shillings, which he had in his waistcoat pocket, the marked half crowns and three of the marked shillings which had been given to Wilson and Bushman; only seven shillings and sixpence were found in the till, and it appeared that Mrs. Tilt had taken one shilling in the shop and put it into the till during her husband's absence, so that the two shillings which had been left therein in the morning, the one shilling which Mrs. Tilt had put into it, the four shillings and sixpence laid out by Mary Bushman, and the five shillings and sixpence marked money which was found in the prisoner's pocket, made up the sum which ought to have been put into the till. The prisoner, upon this evidence, was found guilty and received sentence of transportation. But a case was reserved for the opinion of the twelve judges: Whether, as Mr. Tilt had divested himself of this money by giving it to Mary Hill, who had given it to her servants in the manner and for the purpose above described, and as it did not appear that the prisoner had, on receiving it from them, put it into the till or done anything with it that could be construed a restoring it to the possession of his master, the converting of it to his own use by putting it into his own pocket could amount to the crime of larceny; it being essential to the commission of that offense that the goods should be taken from the possession of the owner, and, although no opinion was ever publicly delivered upon this case, the prisoner was discharged.²

REX v. SULLENS.

(Court for Crown Cases Reserved. 1826. 1 Mood. 129.)

The prisoner was tried before Alexander, C. B., at the Spring Assizes for the county of Essex, in the year 1826, on an indictment at common law—the first count of which charged the prisoner with stealing at Doddinghurst, on the 25th of September, 1825, one promissory note, value £5, the property of Thomas Nevill and George Nevill, his masters; the second count, with stealing silver coin, the property of Thomas Nevill and George Nevill.

It appeared in evidence that Thomas Nevill, the prisoner's master, gave him a £5 country note, to get change, on the said 25th of September; that he got change, all in silver, and on his obtaining the change he said it was for his master, and that his master sent him. The prisoner never returned.

² On the consultation among the judges on this case, they were of opinion that Bull was not guilty of felony, but only of a breach of trust; the money never having been put into the till, and, therefore, not having been in the possession of the master as against the defendant. 2 East, P. C. 572.

The jury found the prisoner not guilty on the first count, but guilty on the second count.

The question reserved for the consideration of the judges was whether the conviction was proper, or whether the indictment should not have been on St. 39 Geo. III, c. 85, for embezzlement?

In Easter Term, 1826, the judges met and considered this case, and held that the conviction was wrong, because, as the masters never had possession of the change, except by the hands of the prisoner, he was only amenable under St. 39 Geo. III, c. 85.¹

REGINA v. MASTERS.

(Court for Crown Cases Reserved, 1848. 1 Denison, 332.)

Orlando Masters, a clerk in the employment of William Holliday, was tried at the Michaelmas Quarter Sessions, A. D. 1848, for the borough of Birmingham, on an indictment charging him with embezzling three sums of money received by him for and on account of his master, the prosecutor.

It appeared in evidence that the course of business adopted by the house was for the customers to pay moneys into the hands of certain persons, who paid them over to a superintendent. He accounted with the prisoner, and paid over such moneys to him, and the prisoner, in his turn, accounted with cashiers, and paid over the moneys to them—he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers; their accounts being in like manner checks upon him. These four parties to the receipt of the moneys are all servants of the prosecutor.

With respect to the three sums in question, it was proved that they passed in due course from the customers through the hands of the immediate receivers and the superintendent to the prisoner, who willfully and fraudulently retained them.

On behalf of the prisoner it was objected, on the authority of *Rex v. Murray*, 1 Moody's C. C. 276, that the moneys, having before they reached the prisoner been in the possession of the prosecutor's servants, did in law pass to the prisoner from his master, and that consequently the charge of embezzlement could not be sustained.

The Recorder left the case to the jury, reserving the point.

The prisoner was convicted and sentenced to 12 months' imprisonment, with hard labor.

This case was argued before POLLOCK, C. B., and PATTESON, MAULE, CRESWELL, and ERLE, JJ., on the 11th of November, 1848, at the first sitting of the court created by St. 11 & 12 Vict. c. 78.

¹ Accord: *Reg. v. Hawth*, 7 Car. & P. 281 (1836); *Commonwealth v. King*, 9 Cush. (Mass.) 284 (1852).

POLLOCK, C. B. The court are unanimously of opinion that no further argument is necessary. This case is quite different from that of *R. v. Murray*, 1 Moo. C. C. 276. There the case was not within St. 7 & 8 Geo. IV, c. 29, § 47, because the master had had possession of the money by the hands of another servant, and when it was given to the prisoner by that servant, to be paid away on account of the master, it must be deemed in law to have been so given to the prisoner by his master. The fraudulent appropriation of it, being thus a tortious taking in the first instance, was not embezzlement, but larceny. But here the money never reached the master at all. It was stopped by the prisoner on its way to him. The original taking was lawful, and therefore the fraudulent appropriation was embezzlement.

REGINA v. KAY.

(Court for Crown Cases Reserved, 1857. 7 Cox, C. C. 289.)

The following case was reserved by Bramwell, B.:

The prisoner was tried before me at the last assizes for Ruthin on an indictment which charged him with stealing a post letter and a watch, laid to be the property of the Postmaster General, and in another count of Thomas Jones.

Thomas Jones had bought a watch in London, which, requiring some regulating, he had sent to the seller, named Myers. A letter was written by some person, in his name and without his authority, requesting the seller to return the watch to him, Thomas Jones, in a letter directed to the care of the postmaster at Brymbo. After this letter had been written, the prisoner, and a person who falsely represented himself to be Thomas Jones, came to the Brymbo post office and asked for the watch. It had not arrived, and the man personating Thomas Jones requested that, when it did, it might be delivered to the prisoner. This was accordingly done by a clerk at the post office at the prisoner's request next day, on the arrival of the watch. It must be taken that the writing of the letter, the personation of Thomas Jones, and application for the watch were parts of the same scheme, and that the watch was sent to Brymbo by the seller in pursuance of the fraudulent letter.

On this and other evidence the prisoner was convicted.

COLERIDGE, J., now delivered the judgment of the court. We are of opinion that the prisoner in this case was rightly convicted of felony. Thomas Jones, the owner of a watch, had placed it with the seller for a specific purpose, the regulating it; and, as it is not stated that he had given any specific directions when or how it was to be returned, it must be taken that the seller had no authority to deliver it to any one but Thomas Jones, or some one commissioned by him to receive it. By the fraud of the prisoner he is induced to

believe that Thomas Jones had desired him to send it by post to the postmaster at Brymbo, inclosed in a letter addressed to Thomas Jones. The postmaster, also, induced by the fraud of the prisoner, delivers the watch to him, believing him to be Thomas Jones or his agent, and thus the possession is obtained. Now, assuming it to have been correctly contended in the argument that the seller of the watch had more than a bare charge and was the bailee of it, yet his special property has not put an end to the general property of the true owner; and when he sent the watch away to a third person, addressed to the true owner, intending such third person to deliver it to the true owner, and that third person, the postmaster, received it for that purpose, the seller's possession and right of possession and special property all ceased. The general property of the true owner became entirely unincumbered and drew to it the possession, unless the postmaster himself became the bailee, as the seller had been before. But this he did not, according to *Pearce's Case*, 2 East, P. C. 603, where the prisoner, pretending to be a mail guard, obtained from the postmaster the bags of letters, and was held to have been rightly convicted of stealing letters out of the post office; the postmaster having no property in them, but only a charge. Although the prisoner had by fraud induced the seller to part with his special property, assuming that he had such, yet no possession had thereby in fact become vested in him; and, when the possession in fact had come to the postmaster, it would be unreasonable to hold that the prisoner, by calling himself Thomas Jones, and falsely pretending to be the true owner, had made the postmaster his servant and agent, or the postmaster's actual possession his, since the postmaster had received it for the true owner and intended to deliver it to the true owner. The postmaster being the servant of the true owner for this purpose, his possession was the possession of the true owner, and could not be divested by the tortious taking from him, according to *Wilkin's Case*, 2 East, P. C. 673, 674. On this ground the prisoner's offense appears to have been clearly larceny.

Conviction affirmed.¹

REGINA v. REED.

(Court of Criminal Appeal, 1854. 6 Cox, C. C. 284.)

The following case was reserved by the Court of Quarter Sessions for the county of Kent:

At the General Quarter Sessions of the Peace for the county of Kent, holden at Maidstone, on the 4th of January, 1853, before Aretus Akers, Edward Burton, and James Espinasse, Esqs., justices appointed to try prisoners in a separate court, Abraham Reed

¹ See, also, *People v. McDonald*, 43 N. Y. 61 (1870).

was tried upon an indictment for feloniously stealing 200 pounds weight of coals, the property of William Newton, his master, on the 6th of December, 1852, and James Peerless was charged in the same indictment with receiving the coals, knowing the same to have been stolen, and was acquitted.

The evidence of the prosecutor, William Newton, was as follows: "I am a grocer and miller at Cowden, and sell coals by retail. The prisoner, Reed, entered my service last year, about three weeks before the 6th of December. On that day I gave him directions to go to a customer to take some flour, and thence to the station at Edenbridge, for 12 hundredweight of coals. I deal with the Medway Company, who have a wharf there; Holman being wharfinger. I told Reed to bring the coals to my house. Peerless lives about 500 yards out of the road from the station to my house. Reed went about 9 a. m., and ought to have come back between 3 and 4 p. m.; but, as he had not come back, I went in search of him at half-past 6, and found him at Peerless'. The cart was standing in the road opposite the house, and the two prisoners were taking coals from the cart in a truck basket. It was dark. I asked Reed what business he had there, he said: 'To deliver half a hundredweight, for which he had received an order from Peerless.' Reed had never before told me of such an order, and had no authority from me to sell coals. Later that evening I went and asked Peerless what coals he had received from my cart. He said: 'Half a hundredweight.' I then asked him how they were carried from the cart. He said: 'In a sack.' I weighed the coals when brought home, and found the quantity so brought a quarter of a hundredweight and four pounds short. I went to Peerless' next day and found some coals there, apparently from half to three-quarters of a hundredweight."

This case was first argued on the 23d of April, 1853, before Jervis, C. J., Parke, B., Alderson, B., Wightman, J., and Cresswell, J., when the court took time to consider their judgment. The court afterwards directed that the case should be argued before all the judges, and in pursuance of that direction the case was again heard on the 19th of November, 1853.¹

LORD CAMPBELL, C. J. There lies before me a judgment that I had prepared for myself at a time when there was reason to suppose that there might be one, if not more, dissenting judges. I have reason to believe now that there will not be any dissent; but still this judgment must be considered only as embodying the reasons I give for my opinion, because I have no authority to say that my Brothers concur in that opinion and the reasons for it. For convenience, I have written my judgment, and my learned Brothers will say how far they concur or dissent. I am of opinion that the prisoner has been properly convicted of larceny. There can be no doubt that, in such a case, the

¹ Part of this case is omitted.

goods must have been in the actual or the constructive possession of the master, and that, if the master had not otherwise the possession of them than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore, if there had been a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have, therefore, to consider whether the exclusive possession of the coals continued with the prisoner down to the time of the conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it; and, if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny. That is expressly determined in *Robinson's Case*, 2 East, 565. There seems considerable difficulty in contending that, if the master was in possession of the cart, he was not in possession of the coals which it contained; the coals being his property, and deposited there by his order, for his use. Mr. Ribton argued that the goods received by a servant for his master remain in the exclusive possession of the servant till they have reached their ultimate destination. But he was unable, notwithstanding his learning and ingenuity, to give any definition of "ultimate destination," when so used. He admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or charge of the coals, as a butler has of his master's plate, or a groom has of his master's horse. To this conclusion, with the most sincere deference to any of my learned Brothers who may at any time have taken a different view—to this conclusion I should have come on principle; and I think that *Spears' Case* is an express authority for it. There is no con-

flicting authority; for in all the cases relied upon by Mr. Ribton the exclusive personal possession of the prisoner had continued down to the time of the wrongful conversion. It is said there is great subtlety in giving such an effect to the deposit of the coals in the prosecutor's cart; but the objection rests on a subtlety wholly unconnected with the moral guilt of the prisoner, for as to that it must be quite immaterial whether the property in the coals had or had not vested in the prosecutor prior to the time when they were delivered to the prisoner. We are to determine whether this would have been a case of larceny at common law before there was any statute against embezzlement; and I do not think that there would have been any reproach to the administration of justice in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the prisoner, who stole it, was sufficiently answered by the subtlety that when the prisoner had once parted with the personal possession of it, so that a constructive possession by the prosecutor began, the servant who subsequently stole it should be liable to be punished as if there had been a prior property and possession in the prosecutor, and that the servant should be adjudged liable to be punished for a crime, instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action. In approaching the confines of different offenses created by common law or by statute, nice distinctions must arise and must be dealt with. In the present case it is satisfactory to think that the ends of justice are effectually gained by affirming the conviction; for the only objection to it is founded upon an argument that he ought to have been convicted of another offense of the same character, for which he would have been liable to the same punishment.

JERVIS, C. J. I concur in the judgment of the Lord Chief Justice. I had originally written a judgment concurring in the view taken by my lord, but ultimately I have not found it necessary to read it. It is admitted that the cart was in the possession of the servant for a special purpose. If he had taken the cart, he would have been guilty of larceny; and, if the cart for this purpose continued the cart of the master, the delivery of the coals into the cart was a delivery to the master, and makes the offense a larceny.²

² Parke, B., thought the acts of the prisoner did not constitute larceny, but felt bound by the authority of *Rex v. Abrahams*, 2 Leach, 828, and *Rex v. Spears*, Id.

"It is plain that the mere physical presence of the money there (in the master's till) for a moment is not conclusive, while the servant is on the spot and has not lost his power over it, as, for instance, if the servant drops it, and instantly picks it up again. Such cases are among the few in which the actual intent of the party is legally important; for, apart from other considerations, the character in which he exercises his control depends entirely upon himself. *Sloan v. Merrill*, 135 Mass. 17, 19; *Jefferds v. Alvard*, 151 Mass. 94, 95, 23 N. E. 734; *Commonwealth v. Drew*, 153 Mass. 588, 594, 27 N. E. 593. It follows from what we have said that the defendant's first position cannot be maintained, and that the judge was right in charging the jury that if the defendant, before he placed the money in the drawer, intended to

II. TRESPASS IN TAKING POSSESSION.

REGINA v. REEVES.

(Essex Assizes, 1859. 5 Jur. [N. S.] 716.)

Larceny. The prosecutor deposed that, being somewhat tipsy, he lay on the ground partly asleep, and while in that state saw the prisoner take his watch out of his pocket, which he took no steps to prevent, believing that the prisoner, with whom he had been acquainted for some time, was acting solely from friendly motives. Some days after he claimed his watch from the prisoner, who denied having had it; but other witnesses deposed that he had in the meantime offered it for sale.

F. Robinson, for the prisoner, objected that there was no trespass, and consequently no larceny.

CROWDER, J. This evidence would not support a charge of larceny at common law, but the recent statute (St. 20 & 21 Vict. c. 54, § 4), enacts that "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny." Here the evidence discloses a bailment sufficient to bring the case within that statute—i. e., if the jury are satisfied on the facts.

F. Robinson. The point is quite new.

Verdict—Not guilty.

COMMONWEALTH v. WHITE.

(Supreme Judicial Court of Massachusetts, 1853. 65 Mass. 483.)

Indictment for larceny from a stable, of a horse, wagon, and harness, alleged to have been committed in the county of Bristol. The stable was situated in Easton, in that county, and the property belonged to John McDonald. At the trial in the court of common pleas, before Wells, C. J., the evidence tended to prove that said property was in the stable of the owner, who was absent. The said James White represented to Josiah White, Jr., the other defendant, that he had hired the horse and wagon of the owner, and invited him to go to North Bridgewater. They harnessed the horse about 5 o'clock p. m. and started, and met the owner. He called to them to stop, but they passed on without heeding him. They went to North Bridgewater,

appropriate it, and with that intent simply put it into the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it just afterwards larceny." Holmes, J., in *Commonwealth v. Ryan*, 155 Mass. 523, 30 N. E. 364, 15 L. R. A. 317, 31 Am. St. Rep. 560 (1892).

and stayed there till evening, when they started on their way back. The horse becoming disabled by a fall, they unharnessed him, turned him loose, and took another horse from a pasture near the road, and harnessed him into the wagon, and proceeded into Easton on the road towards the stable of the owner. While riding along in the town of Easton, James White proposed to Josiah to go to Brighton, in the county of Middlesex. Josiah consented, and they, while in the town of Easton, turned from the road leading to the stable of McDonald and drove to Brighton. And there Josiah, under the instruction and direction of James, put the property into the hands of an auctioneer, stating that his name was Johnson, and that the horse belonged to his father, who had given him leave to sell him. The auctioneer sold the same, but, something happening to excite his suspicions, he refused to pay over the money. McDonald testified that he did not let the horse, wagon, and harness, or either of them, to James White, nor had he ever let to him any horse, wagon, or harness, but that he had sometimes, but not on this occasion, let to Josiah White, Sr., the wagon and harness, but never that horse; that he did not use any force to stop defendants, when he met them, because it would have been very inconvenient for him to have got off from his load; and that he expected they would return the horse and wagon.

The counsel for the defendant contended: (1) That if the property was let to James White and Josiah White, Jr., there was no larceny. (2) That if the defendant took the property without leave, although the taking was a trespass, but if he intended, when he took it, to return it, there was no larceny, although, while on the way, he should determine to appropriate the property, and should proceed to do with it as appeared from the testimony. (3) That there was no evidence of such a conversion of the property as would amount to the crime of larceny, if the property was taken without leave, but with the intention at the time of returning it.

But the court instructed the jury that if the taking was a trespass, and if the trespasser, at the time of taking, intended to appropriate the property to his own use, the taking would be a larceny of the entire property. If the taking was a trespass, but the defendant intended at the time of taking to return the property, and this intention continued until after the shifting of the horses, there was no larceny of the horse. But if afterwards, and before proposing to go to Brighton, the defendant determined to take the property to Brighton and there dispose of it as his own, and he did in pursuance of that determination do that which was stated in the testimony, this would amount to larceny of the wagon and harness.

The jury found the defendant guilty of simple larceny of the wagon and harness, and not guilty of the residue of the charge in the indictment, and to these instructions the defendant excepted.¹

¹ Argument of counsel is omitted.

MERRICK, J. There appears to be no legal objection to the conviction of the defendant. The questions of fact which arose upon the trial were submitted to the jury, under suitable and accurate instructions in matters of law. The wrongful taking of goods by a party with an intent to assume them as his own, or to convert them to his own use, is a trespass merely. And in many cases the subsequent fraudulent appropriation and conversion of goods, the possession of which has been rightfully obtained, does not constitute a felony. *Rosc. Crim. Ev.* 472, 478; *Archb. Crim. Pl.* 186. But if a person by committing a trespass has tortiously and unlawfully acquired possession of personal property belonging to another, and afterwards conceives the purpose of fraudulently depriving the owner of it, and in pursuance of that design, with a felonious intent, carries it away and converts it to his own use, he thereby commits and is guilty of the crime of larceny. 1 *Hale, P. C.* 507; 2 *East, P. C.* 662; *Regina v. Riley*, 1 *Dears. C. C.* 149. This is the effect and substance of the explanation and statement of the law made by the presiding judge upon the trial. While the defendant was on his way to North Bridgewater, and also during the time of his return, until he fraudulently determined to appropriate and convert the horse to his own use, and until he did some act in execution of that purpose, he was only a trespasser; but he made himself a thief as soon as he drove or led away the horse, or made any disposition of him with such a felonious intent. This, indeed, is not strenuously denied by his counsel, who relies, in the defense, much more upon the objection that no larceny was committed before the arrival of the defendant at Brighton in the county of Middlesex. But it is clear that the crime had been fully committed at an earlier period. The jury must have found, under the direction of the court, that the defendant formed the determination to take the property to Brighton and there dispose of it as his own before "the horses were shifted," and that he drove on in execution of that design until the horse became "disabled by a fall." Here, then, while the defendant was still in the county of Bristol, are developed the existence of all the elements of the crime of larceny—the unlawful taking, the felonious intent, and the fraudulent conversion of the property to his own use. Upon such proof a conviction was inevitable, and the verdict against the defendant must therefore be affirmed.

Exceptions overruled.²

² Accord: *Reg. v. Riley*, 1 *Dears.* 149 (1853); *Weaver v. State*, 77 *Ala.* 26 (1884); *Dozier v. State*, 130 *Ala.* 57, 30 *South.* 396 (1901).

MITCHUM v. STATE.

(Supreme Court of Alabama, 1871. 45 Ala. 29.)

Appeal from circuit court of Shelby. Tried before Hon. Chas. Pelham. The facts material to the point decided will be found in the opinion.

Cobb and Lewis, for appellant. The testimony shows that the matches were placed upon the counter for the use of the public and the accommodation of the public; that any and every person had the right to take the matches without limit to light their pipes and cigars. The defendant certainly had the right to take the matches to light his pipe or cigar, and he had the right to use the entire box in this way. The fact that he may have used them for a different purpose would not make the taking felonious.

There can be no larceny where the owner consents to the taking. The taking must be without authority and against the will of the owner. If the taking is not felonious, although the property may be converted to an improper use, yet the defendant is not guilty of larceny.

John W. A. Sanford, Attorney General, contra.

B. F. SAFFOLD, J. The defendant was indicted for petit larceny. On the trial, the evidence material to the exception taken by him was that the box of matches, the subject of the larceny, was placed on the counter of the store to be used by the public in lighting their pipes and cigars in the room, and for their accommodation, and was taken therefrom by the defendant. The court was requested by the prisoner to charge the jury that if the matches were placed on the counter of the storehouse for the use of customers, or the public, and they were taken while there for such use, the defendant was not guilty. The charge was refused, and the defendant excepted.

Larceny may be committed of property under the circumstances attached to the box of matches. The owner had not abandoned his right to them. They could only be appropriated in a particular manner and in very limited quantity, with his consent. Taking them by the boxful without felonious intent would have been a trespass, and with it, a larceny. The ownership was sufficiently proved.

The judgment is affirmed.

BUTLER'S CASE.

(Suffolk Assizes, 1585. 7 Coke, 53.)¹

COKE, C. J., reported a case which was where Butler and others upon the sea, next to the town of Laystoft, in Suffolk, robbed divers of the queen's subjects, and spoiled them of their goods, which goods they brought into Norfolk; and there they were apprehended, and there brought before me, then a justice of the peace within the same county, whom I examined; and in the end they confessed a cruel and barbarous piracy, and that those goods which then they had with them were part of the goods which they had robbed from the queen's subjects upon the high sea; and I was of opinion that in that case it could not be felony, punishable by the common law, because that the original act (scil.), the taking of them, was not any offence whereof the common law taketh knowledge; and by consequence, the bringing of them into a county could not make the same felony punishable by our law; and it is not like where one stealeth goods in one county and brings them into another; there he may be indicted of felony in any of the counties, because that the original act was felony whereof the common law taketh knowledge. And yet, notwithstanding I committed them to the gaol until the coming of the justices of the assizes. And at the next assizes the opinion of Wray, Chief Justice, and Periam, Justice of Assize, was, that forasmuch as the common law doth not take notice of the original offence, the bringing of the goods stolen upon the sea into a county did not make the same punishable at the common law. And thereupon they were committed to Sir Robert Southwell, then vice admiral of the said counties. And this in effect agrees with Lacy's Case, which see in my reports cited in Bingham's Case, in 2 Coke, 93, and in Constable's Case, 3 Coke, 107.

STINSON v. PEOPLE.

(Supreme Court of Illinois, 1867. 43 Ill. 397.)

Mr. Justice BREESE delivered the opinion of the court.²

Counsel for plaintiffs in error make this point, that the recorder's court of Cook county had no jurisdiction of the offense; the original felonious taking, if such, having occurred in the state of Indiana.

It is answered to this by the Attorney General, and correctly, that the principle is well established, where the original taking is felonious, every act of possession continued under it by the thief is a felonious taking, wherever the thief may be; and to whatever place he car-

¹ This statement of the case is reprinted from the Case of the Admiralty, 7 Coke, 51.

² Part of this case is omitted.

ries the stolen property he may be there indicted, convicted, and punished for the felony.

This money continued to be the property of the prosecutor. When taken at Lake Station, in Indiana, and brought into Chicago, it was still his property, and not only that, but the possession, in legal contemplation, continued in him, and every moment's continuance of the trespass was as much a wrong as the first taking, and may as well come under the allegation "took." Therefore it follows that these plaintiffs did take, wherever they had, the goods. The authorities on this point are conclusive. 1 Hawkins, P. C. 151, § 52; *People v. Burke*, 11 Wend. (N. Y.) 129. In this case the goods had been stolen in Canada, and, independent of the statute of New York, the court held that by the common law the offender could be punished in any county where he carries the stolen goods, as he is guilty of stealing them in every place where he has them.

Perceiving no error in the record to the prejudice of the prisoners, the judgment is affirmed.

Judgment affirmed.²

III. TRESPASS IN THE APPROPRIATION OF LOST GOODS.

MERRY v. GREEN.

(Court of Exchequer, 1841. 7 Mees. & W. 623.)

Trespass for an assault and false imprisonment. The defendant's plea set up that the plaintiff had committed larceny, for which cause the defendant gave the plaintiff into the custody of the proper peace

² Accord: *State v. Cummings*, 33 Conn. 260, 89 Am. Dec. 208 (1866); *State v. Bennett*, 14 Iowa, 479 (1863); *Ferrill v. Commonwealth*, 1 Duv. (Ky.) 153 (1864); *Worthington v. State*, 58 Md. 403, 42 Am. Rep. 338 (1882); *Commonwealth v. White*, 123 Mass. 430, 25 Am. Rep. 116 (1877); *Watson v. State*, 36 Miss. 593 (1859); *State v. Bouton*, 26 Nev. 34, 62 Pac. 595 (1900); *Hamilton v. State*, 11 Ohio, 435 (1842); *State v. Johnson*, 2 Or. 115 (1864); *State v. Hill*, 19 S. C. 435 (1883). The same result has been reached by statute in some states. *La Vaul v. State*, 40 Ala. 44 (1866); *McFarland v. State*, 4 Kan. 68 (1866); *People v. Williams*, 24 Mich. 156, 9 Am. Rep. 119 (1871); *State v. Butler*, 67 Mo. 59 (1877); *State v. Newman*, 9 Nev. 48, 16 Am. Rep. 3 (1873); *Barelay v. U. S.*, 11 Okl. 503, 69 Pac. 798 (1902); *State v. Morales*, 21 Tex. 298 (1858).

Contra: *Lee v. State*, 64 Ga. 203, 37 Am. Rep. 67 (1879); *Beal v. State*, 15 Ind. 378 (1860); *Van Buren v. State*, 65 Neb. 223, 91 N. W. 201 (1902); *State v. Le Blanch*, 31 N. J. Law, 82 (1864); *Simmons v. Commonwealth*, 5 Bin. (Pa.) 617 (1813).

When the property is stolen in a foreign country and brought by the thief into a state, it is held that he may be convicted of larceny in such state, in *State v. Underwood*, 49 Me. 181, 77 Am. Dec. 254 (1858); *State v. Bartlett*, 11 Vt. 650 (1839); by statute, *People v. Burke*, 11 Wend. (N. Y.) 129 (1835).

Contra: *Reg. v. Debruil*, 11 Cox, C. C. 207 (1869); *Stanley v. State*, 24 Ohio St. 166, 15 Am. Rep. 604 (1873); *Commonwealth v. Uprichard*, 3 Gray (Mass.) 434, 63 Am. Dec. 762 (1855).

officer, who for the said cause lawfully detained the plaintiff, and that this was the trespass alleged against the plaintiff.¹

To this plea the plaintiff replied *de injuria*, whereupon issue was joined.

At the trial before Tindal, C. J., at the last Warwickshire Assizes, the following appeared to be the facts of the case: Messrs. Mammatt and Tunncliffe, who had for some time resided together at Ashby-de-la-Zouch, in the same house, and keeping the same table and servants, in October, 1839, broke up their establishment and sold their furniture (which was partly joint and partly separate property) by public auction. At that sale the plaintiff, who was a shoemaker, also residing in Ashby, became the purchaser, at the sum of £1. 6s., of an old secretary or bureau, the separate property of Mr. Tunncliffe. The plaintiff kept the bureau in his house, and on the 18th of November following he sent for a boy of the name of Garland, a carpenter's apprentice, to do some repairs to the bureau. Whilst Garland was so engaged he remarked to the plaintiff that he thought there were some secret doors in the bureau, and, touching a spring, he pulled out a drawer which contained a quantity of writings. The plaintiff then discovered another drawer in which was a purse containing several sovereigns and other coins, and under the purse a quantity of bank notes. Of this property the plaintiff took possession, and, telling Garland that the notes were bad, he opened the purse, and gave him one of the sovereigns, at the same time charging him to keep the matter secret. Garland being interrogated by his parents how he came by the possession of the sovereign, the transaction transpired; and it being subsequently discovered that the plaintiff had appropriated the property to his own use, falsely alleging that he had never had possession of a great portion of it, the defendants (one of whom was the solicitor of Mr. Tunncliffe) went with a police officer to the plaintiff's house, took him into custody and conveyed him before a magistrate on a charge of felony. The plaintiff was ultimately discharged, the magistrate doubting whether a charge of felony could be supported. At the trial a witness of the name of Hannah Jenkins was called on behalf of the plaintiff, who deposed that she was present at the auction, and remembered the piece of furniture in question being put for sale and bought by the plaintiff; that after it was sold an observation was made by some of the bystanders to the effect that the plaintiff might have bought something more than the bureau, as one of the drawers would not open, upon which the auctioneer said, "So much the better for the buyer," adding, "I have sold it, with its contents, and it is his." This statement was opposed by the evidence of the auctioneer, who stated, on cross-examination by the defendant's counsel, that there was one drawer which would not open, and that what he had said was: "That is of no consequence. I have sold the

¹ The plea is abridged and part of the case is omitted.

secretary, and not its contents." It did not appear that any person knew that the bureau contained anything whatever.

The learned Chief Justice, in summing up, told the jury that, as the property had been delivered to the plaintiff as the purchaser, he thought there had been no felonious taking, and left to them the question of damages only, reserving leave for the defendant to move to enter a nonsuit. The jury found a verdict for the plaintiff with £50 damages.

PARKE, B. My Lord Chief Justice thought in this case that, even assuming the facts of which evidence was given by the defendant to be true, the taking of the purse and abstracting its contents was not a larceny; and that is the question which he reserved for the opinion of the court, giving leave to move to enter a nonsuit. After hearing the argument, we have come to the conclusion that, if the defendant's case was true, there was sufficient evidence of a larceny by the plaintiff; but we cannot direct a nonsuit, because a fact was deposed to on the part of the plaintiff which ought to have been left to the jury, and which, if believed by them, would have given a colorable right to him to the contents of the secretary, as well as to the secretary itself, viz., the declaration of the auctioneer that he sold all that the piece of furniture contained, with the article itself, and then the abstraction of the contents could not have been felonious. There must, therefore, be a new trial, and not a nonsuit.

But if we assume, as the defendant's case was, that the plaintiff had express notice that he was not to have any title to the contents of the secretary if there happened to be anything in it, and, indeed, without such express notice, if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny.

It was contended that there was a delivery of the secretary, and the money in it, to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it. Both were ignorant of its existence, and, when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this.

The old rule, that "if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny," has undergone in more recent times some limitations. One is that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstance under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny. Russ. Cr. 102. Under

this head fall the cases where the finder of a pocketbook with bank notes in it, with a name on them, converts them *animo furandi*; or a hackney coachman, who abstracts the contents of a parcel which has been left in his coach by a passenger (*Wynne's Case*, Leach, C. C. 413), whom he could easily ascertain; or a tailor, who finds and applies to his own use a pocketbook in a coat sent to him to repair by a customer, whom he must know (*Cartwright v. Green*, 8 Ves. 405)—all these have been held to be cases of larceny; and the present is an instance of the same kind, and not distinguishable from them. It is stated that the offense cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and, instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems, also, from *Wynne's Case*, that if, under the like circumstances, he acquire possession and means to act honestly, but afterwards alter his mind, and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny.

We therefore think that the rule must be absolute for a new trial, in order that a question may be submitted to the jury whether the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a color of right to the property.²

Rule absolute for a new trial.

REGINA v. THURBORN.

(Court for Crown Cases Reserved, 1849. 1 Den. C. C. 387.)

The prisoner was tried before Parke, B., at the Summer Assizes for Huntingdon, 1848, for stealing a bank note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it, indicating who was the owner; nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally. He then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe and did believe it to be the prosecutor's property before he thus changed the note.

The learned Baron directed a verdict of guilty, intimating that he should reserve the case for further consideration. Upon conferring

² Accord: *Robinson v. State*, 11 Tex. App. 403, 40 Am. Rep. 790 (1882).

with Maule, J., the learned Baron was of opinion that the original taking was not felonious, and that in the subsequent disposal of it there was no taking, and he therefore declined to pass sentence, and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon.

On the 30th of April, A. D. 1849, the following judgment was read by PARKE, B.:

A case was reserved by PARKE, B., at the last Huntingdon Assizes. It was not argued by counsel, but the judges who attended the sitting of the court after Michaelmas Term, 1848, namely, the LORD CHIEF BARON, PATTESON, J., ROLFE, B., CRESSWELL, J., WILLIAMS, J., COLTMAN, J., and PARKE, B., gave it much consideration on account of its importance, and the frequency of the occurrence of cases in some degree similar in the administration of the criminal law, and the somewhat obscure state of the authorities upon it. [The learned Baron here stated the case.]¹

In the present case there is no doubt that the bank note was lost, the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and therefore, though he took it with the intent, not of taking a partial or temporary, but the entire, dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation of it to his own use, by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted, so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times, or which always existed, we need not determine. It may have proceeded on the construction of the reason of the old rule, "*Quia Dominus rerum non apparet ideo cuius sunt incertum est*," and the rule is held not to apply when it is certain who is the owner; but the authorities are many, and we believe this qualification has been generally adopted in practice, and we must therefore consider it to be the established law. There are many reported cases on this subject, some where the owner of goods may be presumed to be known, from the circumstances under which they are found. Amongst these are included the cases of articles left in hackney coaches by passengers, which the coachman appropriates to his own use, or a pocketbook, found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might

¹ Part of the opinion is omitted.

be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict.² Some cases appear to have been decided on the ground of bailment, determined by breaking bulk, which would constitute a trespass, as *Wynne's Case*, *Leach*, C. C. 460; but it seems difficult to apply that doctrine, which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding.

The appropriation of goods by the finder has also been held to be larceny, where the owner could be found out by some mark on them, as in the case of lost notes, checks, or bills with the owner's name upon them.

This subject was considered in the case of *Merry v. Green*, 7 M. & W. 623, in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a check, for instance, with the name of the owner on it, where a person originally took it up, intending to look at it, and see who was the owner, and then, as soon as he knew whose it was, took it, *animo furandi*, as, in order to constitute a larceny, the taking must be a trespass, and it was asked when in such a case the trespass was committed? In answer to that inquiry the dictum attributed to me in the report was used—that in such a case the trespass must be taken to have been committed, not when he took it up to look at it and see whose it was, but afterwards, when he appropriated it to his own use, *animo furandi*.

It is quite a mistake to suppose, as Mr. Greaves has done (volume 2, c. 14), that I meant to lay down the proposition in the general terms contained in the extract from the report of the case in 7 M. & W. 623, which, taken alone, seems to be applicable to every case of finding unmarked, as well as marked, property. It was meant to apply to the latter only.

The result of these authorities is that the rule of law on this subject seems to be that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with the intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

In applying this rule, as, indeed, in the application of all fixed rules,

² "In the case where a gold ornament is found at the door of a house, it is ridiculous to say that any person picking it up would not suppose that it belonged to the owner of the house." Rolfe, B., in *Reg. v. Peters*, 1 Car. & K. 247.

questions of some nicety may arise; but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent; in others, appear only after examination.

It would probably be presumed that the taker would examine the chattel as an honest man ought to do at the time of taking it; and, if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel.

To apply these rules to the present case: The first taking did not amount to larceny, because the note was really lost, and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise, from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note, or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it, *animo furandi*, and the point to be decided is whether that was a felony.

Upon this question we have felt considerable doubt.

If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not. It was punishable, as we have already decided, and, though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not, therefore, a trespass in this case more than the others, and consequently no larceny.

We therefore think that the conviction was wrong.

BROOKS v. STATE.

(Supreme Court of Ohio, 1878. 35 Ohio St. 46.)

The plaintiff in error, George Brooks, was convicted of larceny in stealing \$200 in bank bills, the property of Charles B. Newton. The evidence was that Brooks, a scavenger, while engaged in cleaning the streets, on November 20th picked up from the mud and water in the gutter a roll of money consisting of bank bills of the denominations of \$5, \$10, and \$20, and amounting in the aggregate to \$200. It had lain there since the 24th of October, on which day it had been lost by the prosecutor. Notice of the loss had been published in several newspapers; but the evidence did not show that defendant saw any of said notices, or that at the time he found the money he knew of Newton's loss. There were no marks on the money to indicate the owner. At the time of the finding defendant was working with several other laborers. He testified that on picking up the roll he immediately put it in his pocket, without informing his companions that he had found it, and that he did not want them to know of it. Within a half hour after finding the money, he quit work. He spent part of the money the same day, and intrusted part of it to a Mrs. Lease, saying that he had received it from an uncle, and at another time, on being asked by her about it, said, "What if I found it?" Evidence was also given that the defendant shortly afterward left the town, and that before leaving he attempted to secrete himself.¹

WHITE, J. We find no ground in the record for reversing the judgment.

The first instruction asked was properly refused. It was not necessary to the conviction of the accused that he should, at the time of taking possession of the property, have known, or have had reason to believe he knew, the particular person who owned it, or have had the means of identifying him instanter. The charge asked was liable to this construction, and there was no error in its refusal.

The second instruction asked was substantially given in the general charge.

Larceny may be committed of property that is casually lost, as well as of that which is not. The title to the property, and its constructive possession, still remains in the owner; and the finder, if he takes possession of it for his own use, and not for the benefit of the owner, would be guilty of trespass, unless the circumstances were such as to show that it had been abandoned by the owner.

The question is, under what circumstances does such property become the subject of larceny by the finder?

In *Baker v. State*, 29 Ohio St. 184, 23 Am. Rep. 731, the rule stated by Baron Parke, in *Thurborn's Case*, 1 Den. C. C. 387, was adopted.

¹ The statement is abridged and part of the opinion of Okey, J., reciting the facts, is omitted.

It was there laid down that "when a person finds goods that have actually been lost, and takes possession with intent to appropriate them to his own use, really believing at the time, or having good ground to believe, that the owner can be found, it is larceny."

It must not be understood, from the rule as thus stated, that the finder is bound to use diligence or to take pains in making search for the owner. His belief, or grounds of belief, in regard to finding the owner, is not to be determined by the degree of diligence that he might be able to use to accomplish that purpose, but by the circumstances apparent to him at the time of finding the property. If the property has not been abandoned by the owner, it is the subject of larceny by the finder, when, at the time he finds it, he has reasonable ground to believe, from the nature of the property, or the circumstances under which it is found, that if he does not conceal, but deals honestly with it, the owner will appear or be ascertained. But, before the finder can be guilty of larceny, the intent to steal the property must have existed at the time he took it into his possession.

There are cases in conflict with the foregoing view; but we believe it correct in principle, and well supported by authority. *Glyde's Case*, 1 L. R. C. C. 139; *Moore's Case*, *Leigh & Cave's Case*, 1 L. R. C. C. 1; *Regina v. Knight*, 12 Cox, 102; *Commonwealth v. Titus*, 116 Mass. 43, 17 Am. Rep. 138; *Ransom v. State*, 22 Conn. 153; 2 Russ. Crimes (9th Am. Ed. [4th Eng. Ed.]) 179, 180, and note there found to *Thurborn's Case*.

The case was fairly submitted to the jury, and from an examination of the evidence we find no ground for interfering with the action of the court below in refusing a new trial.

Judgment affirmed.²

OKEY, J. I do not think the plaintiff was properly convicted.

No doubt the plaintiff was morally bound to take steps to find the owner. An honest man would not thus appropriate money before he had made the finding public and endeavored to find the owner.

² Accord: *State v. Clifford*, 14 Nev. 72, 33 Am. Rep. 526 (1879). Cf. *Reg. v. Knight*, 12 Cox, C. C. 102 (1871).

"If the owner has placed no mark about the property, and none exists, by which the finder can discover him, the case must still be considered, as it long has been, one of mere trover and conversion—not of larceny. The general remark in *People v. McGarren*, 17 Wend. (N. Y.) 460, that a finder having the means of discovery is an exception, must be taken with the limitation indicated by the authorities referred to. Every finder may be said to have the means of discovering the owner by the exercise of an honest diligence; and if, when valuable property is lost, such means be made a test, the doctrine of *People v. Anderson* is indeed gone. Scarcely any finder could fail in his search; and, this being generally obvious to a jury, they would hardly ever fail to convict for that reason. The rule would thus, in practice, be brought down to a very narrow exception." Cowen, J., in *People v. Cogdell*, 1 Hill (N. Y.) 94 (1841).

Accord: *Parke, B.*, arguendo, in *Reg. v. Dixon*, 7 Cox, C. C. 35 (1855). See, also, *Lane v. People*, 10 Ill. 305 (1848); *Reg. v. Christopher*, 8 Cox, C. C. 91 (1858).

But in violating the moral obligation I do not think the plaintiff incurred criminal liability.

Baker's Case, 29 Ohio St. 184, 23 Am. Rep. 731, was correctly decided. It is stated in the opinion, not only that when he took the goods he intended to appropriate them to his own use, but that he had reasonable ground for believing that Alden was the owner. A passage from *Regina v. Thurborn*, 1 Den. C. C. 387, is cited in that case as containing a correct statement of the law. But a careful examination of *Regina v. Thurborn* will show that the court which rendered the decision would not have sustained this conviction, and that case has been repeatedly followed in England and this country. *R. v. Preston*, 2 Den. C. C. 351; *R. v. West*, 6 Cox, 415; *R. v. Dixon*, 7 Cox, 35; *R. v. Christopher*, 5 Jur. (N. S.) 24; *R. v. Glyde*, 11 Cox, 103; *R. v. Knight*, 12 Cox, 102; *Tanner v. Commonwealth*, 14 Grat. (Va.) 635; *People v. Cogdell*, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; *Lane v. People*, 5 Gilman (Ill.) 305; *State v. Conway*, 18 Mo. 321; 2 Leach, Cr. Cas. 31; *Bailey v. State*, 52 Ind. 462, 21 Am. Rep. 182.

The obligation, stated in the syllabus, that the finder must deal "honestly" with the money, is too indefinite, and the opinion contains no satisfactory explanation of it. This leaves both law and fact to the jury, without any rule to guide them. What one jury might think was honest dealing another jury might think was the reverse. The adverb "properly" or "rightfully" would have been as certain.

GILMORE, C. J., concurs in the dissenting opinion.

LAWRENCE v. STATE.

(Supreme Court of Tennessee, 1839. 1 Humph. 228, 34 Am. Dec. 644.)

REESE, J., delivered the opinion of the court.¹

This is an indictment for grand larceny. The plaintiff in error was a barber, and had a shop in the town of Lebanon. Muirhead, the prosecutor, went to the shop of Lawrence late in the evening for the purpose of having his hair trimmed. This operation having been performed, the prosecutor took out his pocketbook in order to pay the plaintiff in error, and gave him a \$1 bill; but the latter, not having the change, left the shop for the purpose of procuring it, and prosecutor remained. When the prosecutor took out his pocketbook, which contained \$180, he laid it upon a table in the shop. On the return of the plaintiff, prosecutor met him without the door, received his change, and departed. On retiring to bed that night at 9 or 10 o'clock he missed his pocketbook, and remembered that he had left it on the table in the shop. He then went to the shop, where he found the plaintiff, who denied all knowledge of the pocketbook. The foregoing

¹ Part of this case is omitted.

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is a sufficient statement of the evidence with reference to the question discussed before us.

The defendant's counsel contends that the prosecutor, having gone away from the shop without remembering that he had left his pocketbook behind him, the same, during the time his mind remained in that state, may be said to have been lost, and that it has been determined in the case of *Porter v. State*, Mart. & Y. (Tenn.) 226, that the fraudulent appropriation of lost goods, even where the finder knows the owner, is not larceny. We answer that the pocketbook, under the circumstances proved, was not lost, nor could the defendant be called a finder. The pocketbook was left, not lost. The loss of goods, in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner, as to their locality at any given moment. If I place my watch or pocketbook under my pillow in a bedchamber, or upon a table or bureau, I may leave them behind me, indeed; but, if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put anything carefully and voluntarily in the place you intend and then forget it. It is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there. To place a pocketbook, therefore, upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities referred to speak of lost property; and we are of opinion, therefore, that there was no error in the charge of the court in reference to the facts in this case, and we affirm the judgment.²

IV. TRESPASS IN THE APPROPRIATION OF GOODS DELIVERED BY THE OWNER.

(A) When Delivery Gives Possession.

REX v. MEERES.

(Old Bailey, 1688. 1 Show. 50.)

Indictment at the Old Bailey, 16th May last, against Mary Meeres and Susan Vicars, for the stealing a rug and other goods of Robert Geery. Upon not guilty pleaded, a special verdict, that Susan Vicars and her husband, lately deceased, took a lodging room in the house

² Accord: *Rex v. Wynne*, 1 Leach (4th Ed.) 413 (1786); *People v. Swan*, 1 Parker, Cr. R. (N. Y.) 9 (1839); *State v. McCann*, 19 Mo. 249 (1853); *Reg. v. West*, Dears. 402 (1854); *Pritchett v. State*, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468 (1854); *Pyland v. State*, 4 Sneed (Tenn.) 357 (1857); *Reg. v. Moore*, 8 Cox C. C. 416 (1861); *State v. Cummings*, 33 Conn. 260, 89 Am. Dec. 208 (1866); *State v. Farrow*, 61 N. C. 161, 93 Am. Dec. 585 (1867).

of Richard Geery, furnished with the goods mentioned in the indictment from week to week, at two shillings per week; that the key of the door, was delivered to the said Susan, which she kept; that Susan paid one week's payment for the room and lodging, and continued therein about four weeks; that the said Susan and Mary, on the day in the indictment, and before the expiration of the fourth week, took and carried away the goods, et si., etc.¹

Chief Justice HOLT thought it no felony. POLLEXSEN thought it was, and that a lodger had the bare use as a guest hath, and that fieri fac. against the landlord would reach these goods as is the constant practice; that no indebitatus lay for the rent of the room, which shows the money was for the room and not the goods. ATKINS, that it was no felony, and that a lodger had more than a bare use, and nowadays lodgings furnished, and perhaps the greater part of the house, are taken by the year, and there is no difference in the time. NEVIL, no felony. TURTON, no felony. ROKESBY, thought it no felony, because no intent found to steal, either in the taking the lodgings or in carrying away the goods. VENTRIS, of the same. But all thought it a point deserving very good consideration.

REX v. LEIGH.

(Court for Crown Cases Reserved, 1800. 1 Leach, C. C. 411, note.)

Elizabeth Leigh was indicted at Wells Assizes in the summer of 1800 for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, consisting of a shop containing muslin and other articles mentioned in the indictment, was on fire, and that his neighbors had in general assisted at the time in removing his goods and stock for their security. The prisoner probably had removed all the articles which she was charged with having stolen, when the prosecutor's other neighbors were thus employed; and it appeared that she removed some of the muslin in the presence of the prosecutor and under his observation, though not by his desire. Upon the prosecutor applying to her the next morning, she denied that she had any of the things belonging to him, whereupon he obtained a search warrant and found his property in her house; most of the articles artfully concealed in various ways. But it was suggested that she originally took the articles with an honest purpose, as her neighbors had done, and that she would not otherwise have taken some of them in the presence and under the view of the prosecutor, and that therefore the case did not amount to felony. The jury, from the observations they received from the court, found her guilty, but said that, in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon

¹ Argument of counsel is omitted.

her afterwards. And upon a reference to the judges in Michaelmas Term, 1800, all (absent, LAWRENCE, J.) held the conviction wrong, for that, if the original taking were not with intention to steal, the subsequent conversion was no felony, but a breach of trust.

REGINA v. EVANS.

(Abingdon Assizes, 1842. 1 Car. & M. 632.)

Larceny. The prisoner was indicted for stealing a waistcoat, the property of Joseph Johnson.

It was proved by the prosecutor, that he, on the 31st of May, 1842, gave the waistcoat into the hands of the prisoner to take to Eliza Rose to have it washed; and it was proved by Eliza Rose that the prisoner brought the waistcoat to her to be washed, at the same time telling her it was his own; and she further stated that she washed the waistcoat and delivered it to the prisoner on the 5th of June; and it was also proved that the prisoner, when he was apprehended, told the constable where to find it.

Tyrwhitt, for the prosecution, referred to 3 Inst. 107.

ERSKINE, J. I think that the prisoner's getting back the waistcoat from Eliza Rose was no larceny, because he delivered it to her as his own. He must, therefore, be taken to have converted it to his own use before he delivered it to her. There is, however, one question on which the case must go to the jury.

The prisoner was called on for his defense.

ERSKINE, J., left it to the jury to say whether the prisoner, at the time when he received the waistcoat from the prosecutor, had an intention of stealing it, for that if, at that time, he had not an intention of stealing it, he was entitled to be acquitted.

Verdict—Not guilty. The foreman of the jury adding: "We find that the prisoner had no intention to steal the waistcoat at the time when he received it from the prosecutor."¹

CARRIER'S CASE.

(Star Chamber and Exchequer Chamber. 1473. Y. B. 13 Edw. IV. 9. pl. 5²)

In the Star Chamber before the King's Council such matter was shown and debated; where one has bargained with another to carry certain bales with, etc., and other things to Southampton, he took

¹ Accord: Reg. v. Fletcher, 4 Car. & P. 545 (1831); Reg. v. Savage, 5 Car. & P. 143 (1831).

² This case is printed from the translation in Pollock & Wright's *Possession in the Common Law*.

them and carried them to another place and broke up (debrusa) the bales and took the goods contained therein feloniously, and converted them to his proper use and disposed of them suspiciously; if that may be called felony or not, that was the case.

BRIAN, C. J. I think not, for where he has the possession from the party by a bailing and delivery lawfully, it cannot after be called felony nor trespass, for no felony can be but with violence and vi et armis, and what he himself has he cannot take with vi et armis nor against the peace: therefore it cannot be felony nor trespass, for he may not have any other action of these goods but action of detainue.

Hussey, the King's Attorney. Felony is to claim feloniously the property without cause to the intent to defraud him in whom the property is, animo furandi, and here notwithstanding the bailment ut supra the property remained in him who bailed them, then this property can be feloniously claimed by him to whom they were bailed, as well as by a stranger, therefore it may be felony well enough.

THE CHANCELLOR. Felony is according to the intent, and his intent may be felonious as well here as if he had not the possession.

MOLINEUX ad idem. A matter lawfully done may be called felony or trespass according to the intent; sc. if he who did the act do not pursue the cause for which he took the goods, as if a man distrain for damage feasant or rent in arrear and then he sell the goods and kill the beasts, this is tort now where at the beginning it was good. So if a man come into a tavern to drink it is lawful, but if he carry away the piece or do other trespass then all is bad. So although the taking was lawful in the carrier ut supra, etc., yet when he took the goods to another place ut supra he did not pursue his cause, and so by his act after it may be called felony or trespass according to the intent.

BRIAN, C. J. Where a man does an act out of his own head, it may be a lawful act in one case and in another not, according to his act afterwards, as in the cases which you have put, for there his intent shall be judged according to his act; but where I have goods by your bailment, this taking cannot be made bad after by anything.

Vavisour. Sir, our case is better than a bailment, for here the things were not delivered to him, but a bargain that he should carry the goods to S. ut supra: and then if he took them to carry them thither, he took them warrantably; and the case put now upon the matter shows, that is, his demeanor after shows, that he took them as felon, and to another intent than to carry them ut supra, in which case he took them without warrant or cause, for that he did not pursue the cause, and so it is felony.

CHOKE, J. I think that where a man has goods in his possession by reason of a bailment he cannot take them feloniously, being in possession; but still it seems here that it is felony, for here the things which were within the bales were not bailed to him, only the bales as an entire thing were bailed ut supra to carry; in which case if he

had given the bales or sold them, etc., it is not felony, but when he broke them and took out of them what was within he did that without warrant, as if one bailed a tun of wine to carry, if the bailee sell the tun it is not felony nor trespass, but if he took some out it is felony²; and here the twenty pounds were not bailed to him, and peradventure he knew not of them at the time of the bailment. So is it if I bail the key of my chamber to one to guard my chamber, and he take my goods within this chamber, it is felony for they were not bailed to him.

[It was then moved that the case ought to be determined at common law; but the Chancellor seems to have thought otherwise, for the complainant was a merchant stranger, whose case ought to be judged by the law of nature in chancery, and without the delay of trial by jury. However the matter was afterwards argued before the judges in the Exchequer Chamber, and there.]

It was holden by all but NEDHAM, J., that where goods are bailed to a man he cannot take them feloniously; but NEDHAM held the contrary, for he might take them feloniously as well as another; and he said it had been held that a man can take his own goods feloniously, as if I bail goods to a man to keep, and I come privily intending to recover damages against him in detinue and I take the goods privily, it is felony. And it was holden that where a man has possession and that determines, he can then be felon of the things, as if I bail goods to one to carry to my house, and he bring them to my house and then take them thereout it is felony; for his possession is determined when they were in my house; but if a taverner serve a man with a piece, and he take it away, it is felony for he had not possession of this piece; for it was put on the table but to serve him to drink: and so is it of my butler or cook in my house; they are but ministers to serve me, and if they carry it away it is felony, for they had not possession, but the possession was all the while in me; but otherwise peradventure if it were bailed to the servants so that they are in possession of it.

LAICON, J. I think there is a diversity between bailment of goods and a bargain to take and carry, for by the bailment he has delivery of possession, but by the bargain he has no possession till he take them, and this taking is lawful if he takes them to carry, but if he take them to another intent than to carry them, so that he do not pursue his cause, I think that shall be called felony well enough.

BRIAN, C. J. I think that it is all one, a bargain to carry them, and a bailment, for in both cases he has authority of the same person in whom the property was, so that it cannot be called felony:

² "But I marvel at the case put, 13 Edw. IV, 9: That if a carrier have a tun of wine delivered to him to carry to such a place, and he never carry it, but sell it, all this is no felony, but if he draw part of it out above the value of twelvenpence, this is felony. I do not see why the disposing of the whole should not be felony also." Kel. 83.

M. 2 E. III, in an indictment "*felonice abduxit unum equum*" is bad, but it should be cepit. So in eyre at Nott., 8 E. III; and in this case the taking cannot be feloniously, for that he had the lawful possession, so then the breaking the bales is not felony. Vide 4 E. II, in trespass, for that plaintiff had bought a tun of wine of defendant, and while it was in defendant's guard defendant came with force and arms and broke the tun and carried away parcel of the wine and filled up the tun with water.

And for that it appeared he had possession before, the writ being *vi et armis* was challenged, and yet it was held well and he pleaded not guilty, and then the Justices reported to the Chancellor in Council that the opinion of the most of them was that it was felony.

LANGLEY v. BRADSHAW.

(King's Bench, 1632. Rol. Abr. 73, pl. 16.)

If a man say to a miller who keeps a mill, thou hast stolen three pecks of meal, action lies, for although the corn was delivered to him to grind, yet if he steal the meal it is felony, being taken from the residue.¹

REX v. MADOX.

(Court for Crown Cases Reserved, 1805. Russ. & R. 92.)

This was an indictment for a capital offense on St. 24 Geo. II, c. 45, tried before Mr. Baron Graham at the Summer Assizes at Winchester, in the year 1805.

The first count was for stealing at West Cowes 6 wooden casks and 1,000 pounds weight of butter, value £20, the goods of Richard Bradley and Thomas Clayton, being in a certain vessel called a sloop in the port of Cowes, the said port being a port of entry and discharge, against the statute. The second count was for grand larceny. The third count was like the first, except as to the property in the goods, which was laid in one Richard Lashmore; and the fourth count was for grand larceny of the goods of the said Richard Lashmore.

The butter stolen was part of a cargo of 280 firkins or casks, shipped at Waterford, in Ireland, on board a sloop, the *Benjamin*, of which the prisoner was master and owner, bound to Shoreham and Newhaven, in Sussex; 230 of the casks being consigned to Bradley and Clayton at Shoreham, and 50 of them to Lashmore at Brightelmstone.

It appeared that the ordinary length of this voyage, with fair winds, was a week or nine days, but in winter sometimes a month or five

¹ Accord: *Commonwealth v. James*, 1 Pick. (Mass.) 375 (1823).

weeks. In the present instance the voyage had been of much longer duration.

The vessel first touched at Sheepshead, in Ireland, in distress. The prisoner went on shore at Beerhaven, where he signed a protest, bearing date on the 20th December, 1804. From thence they proceeded to Lundy Island, and to Tenby, in Wales, where they arrived in February, 1805, and at which place the prisoner went on shore and stayed four or five weeks; the winds being foul. From thence they proceeded to Scilly, and then to Cowes, where they arrived on the last day of March, or the 1st of April, 1805. Cowes was in their course, but they had previously met with very foul weather, and had been driven to the westward of Madeira, during which time the vessel had been often in great distress; but no part of the butter had at any time been thrown overboard. Upon the arrival at Cowes the prisoner went on shore, and shortly afterwards applied to one Lallow, a sailmaker, for a suit of sails. Lallow went aboard the vessel, and took measure for the sails, and after his return to Cowes the prisoner called upon him again and bespoke a hammock, and then stated that he had 13 casks of butter on board the vessel belonging to himself, and requested Lallow to send for them and deposit them in his sail loft until the prisoner returned from Newhaven. At the same time he gave Lallow a note, or order, for the mate of the vessel, by which the mate was required to deliver 13 casks of butter to the bearer. Lallow despatched some of his men with the order and a boat to the vessel, where they arrived in the night, and after having delivered the order to the mate received from him 7 casks of butter in the first instance, being as much as the boat would carry, and upon their return to the vessel, during the night, received from the mate the other 6 casks. The order did not require the mate to deliver any particular casks; and it appeared by the evidence of the mate that he took them as they came to hand. The casks had been originally stowed in the hold and upon the half decks as they came on board, and those delivered to Lallow's men were taken from the half decks; the others being battened down. The 7 casks first delivered by the mate were taken to Lallow's premises and deposited there. The other 6 casks were seized by the custom house officers. The prisoner was at Cowes, and was informed by Lallow of the seizure, at which he expressed anger, speaking of the seizure as a robbery, and of the casks so seized as his own property and venture. He also spoke of going to claim his property, and afterwards told Lallow that he would give him an order to claim it, as he must himself go away. The prisoner afterwards went to the vessel, and passed the rest of the night on board. The remainder of the cargo was delivered at Shoreham and Newhaven.

The protest made by the prisoner, and bearing date at Beerhaven, the 20th of December, 1804, purported, amongst other things, that the prisoner had been obliged to throw overboard several casks of butter. And it appeared that he had held the same language to the

consignees as his excuse for delivering short of their respective consignments.

Upon this case the counsel for the prisoner raised two objections: First, that no larceny had been committed by the prisoner; and, secondly, that the offense was not capital—the larceny, if any, being of goods in his own vessel.

Upon the first objection, it seemed to be admitted that if the mate, by the order of the prisoner, had broken bulk by taking the casks from those which were battened down, it might have been larceny in the prisoner; and the learned judge thought that as the casks were taken from the half deck, where they were originally stowed, there was no material difference. It was then contended that the prisoner went into Cowes without any necessity and out of the course of his voyage; and the case was compared to those wherein it had been held that if goods are delivered to a carrier to carry to a certain place, and he carries them elsewhere, and embezzles them, it is no felony. But the learned judge thought that the severance of a part from the rest, and the formed design of doing so, took the case out of those authorities, if they could be considered as applying to the present case.

Upon the second objection, those cases were cited wherein it had been held that St. 12 Anne, c. 7, against larceny in a dwelling house, to the value of 40 shillings, does not extend to a stealing by a man in his own house; but the learned judge thought that, though this might be the law as to a person stealing the goods of another under the protection of his own house, yet the case of a man stealing the goods of another laden on board his own vessel was different, as in such case the vessel, for the voyage, might be considered as the vessel of the freighter, and that, if the owner should take the command of the vessel, the stealing the goods committed to his care would be an aggravation of his offense. And he further observed that the words and occasion of the two statutes would admit of a distinction.

The whole case was therefore left to the jury, who found the prisoner guilty; but the sentence was respited, in order that the opinion of the judges might be taken.

In Michaelmas Term, 1805, the case was considered by the judges, who were of opinion that it was not larceny, and that, if it were larceny, it would not have amounted to a capital offense within St. 24 Geo. II, c. 45.¹

¹ See, also, *Rex v. Pratley*, 5 Car. & P. 533 (1833); *Reg. v. Cornish*, 1 Dears. 425 (1854).

REX v. BRAZIER.

(Court for Crown Cases Reserved, 1817. Russ. & R. 337.)

The prisoner was tried before Mr. Justice Holroyd at the Summer Assizes for the town of Nottingham, in the year 1817, on an indictment for stealing 15 bushels of wheat, of the goods and chattels of Thomas Neale.

Thomas Neale, a farmer, sent 40 bags, containing 20 quarters, of his wheat to the prisoner, who was a wharfinger and warehouseman in the town of Nottingham, and who received the same into his warehouse there for safe custody for the said Thomas Neale. The wheat was to lie there until sold by the prosecutor. The prisoner had no authority to sell it. It was proved that Neale did not give any authority to the prisoner to make any alteration in the wheat, or to open the bags in order to show them, or for any other purpose.

While the wheat thus remained in the prisoner's warehouse for safe custody, and was the property of Neale, the prisoner's servant, by the prisoner's order, took eight of the bags, containing four quarters, of the above wheat from the rest, and, shooting the wheat out of the bags upon the warehouse floor, mixed it with four bags of different wheat of an inferior quality and value. When so mixed, the whole was, by the prisoner's order, put into twelve other bags, and afterwards sent away and disposed of by him for his own benefit. Afterward, by the prisoner's orders, the above four quarters of Neale's wheat were replaced with an equal quantity of the prisoner's wheat, of very inferior quality and value, by mixing the same with two quarters of the residue of Neale's wheat, and replacing the same when so mixed in the bags from whence the four quarters of Neale's wheat had been removed, as before mentioned. Another part of Neale's wheat was in like manner fraudulently removed, mixed, and replaced by the prisoner's orders; and sixteen of the above bags, containing eight quarters of the wheat so mixed, as before stated, were afterwards delivered by the prisoner to the vendee of Thomas Neale, as being part of the wheat deposited by Neale in the prisoner's warehouse.

It did not appear that there was any severing of part of the wheat in any one bag from the residue of the wheat in the same bag, with intent to steal or embezzle that part only that was so severed, and not the residue in the same bag from which it was so severed.

The jury, being of opinion that the facts above stated were proved, found the prisoner guilty of larceny; but the learned judge respited the judgment, and reserved the point for the consideration of the judges.

In Michaelmas Term, 1817, eleven of the judges met and considered this case. They were unanimously of opinion that the conviction was right, that the taking the whole of the wheat out of any one bag was

no less a larceny than if the prisoner had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the bag.¹

REX v. SEMPLE.

(Old Bailey, 1786. 1 Leach [4th Ed.] 420.)

At the ensuing session the prisoner, J. G. Semple, was again indicted for the same offense,² before ADAIR, Recorder; present, Mr. Justice GOULD.

The following facts appeared in evidence: The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighborhood under the name of Maj. Harrold, and had frequently hired chaises from the prosecutor as the occasion required, and for which he had always paid with great punctuality. On the 1st of September, 1785, the prisoner hired a post chaise of the prosecutor, saying that he should want it for three weeks or a month, as he was going a tour round the North. It was agreed that the prisoner should pay at the rate of five shillings a day during the time that he kept the chaise, and a price of fifty guineas was talked about in case he should determine to purchase the chaise on his return to London; but no positive agreement took place between them on the subject of the purchase. In a few days afterwards the prisoner fetched the chaise from Mr. Lycett's with his own horses; and it was in evidence that he was driven in it from London to the Crown and Cushion at Uxbridge, where he ordered a pair of horses, and went from thence to the Duke of Portland's, and returned. He took fresh horses at the Crown and Cushion, but where he went with the chaise afterwards did not appear. The fact was he never returned it to Mr. Lycett, nor could any tidings be obtained of him till twelve months afterwards, when he was accidentally apprehended by

¹ "I think that this was a case of bailment, although the prosecutor's servants were on board, because they were there under the prisoner's control. That being so, if the prisoner had not taken the staves out of the boat, the mere nondelivery of them would not have amounted to larceny; but the prisoner separating one of the articles from the rest and taking it to a place different from that of its destination was, if he did it with intent to appropriate it to his own use, equivalent to breaking bulk, and therefore would be sufficient to constitute a larceny." Patteson, J., in *Rex v. Howell*, 7 Car. & P. 325 (1835).

See, also, *Reg. v. Poyser*, 2 Den. C. C. 233 (1851). In *Nichols v. People*, 17 N. Y. 114 (1858). It was held (Denio, J., dissenting) that the separation by a carrier, without the assent of the owner, of sundry bars of iron, part of a larger number that had been delivered to him for transportation, was a breaking of bulk, making a subsequent conversion of such separated bars larceny.

Accord: *Commonwealth v. Brown*, 4 Mass. 580 (1808). But see *Rex v. Reilly, Jebb*, 51 (1826).

² Larceny.

the activity of Mr. Feltham, in Fleet street, upon a suspicion of having, under false pretenses, defrauded him of a quantity of ladies' hats.

Garrow, for the prisoner, submitted to the court that, admitting the whole of the evidence to be true, the offense did not amount to felony, and he endeavored to distinguish the case from that of Pear's Case, 1 Leach, 212, and Aickle's Case, 1 Leach, 294, inasmuch as in those cases the parties had never obtained the legal possession of the property delivered to them, but that in the present case the prisoner had obtained the chaise upon a contract, which it was not proved that he had broken; for the chaise was not hired for any definite length of time, or to go to any certain place, and the mere understanding that it was for three weeks or a month, for the purpose of making a tour round the North, made no part of the contract. He had hired it for such a length of time as he should please to keep it, at a certain stipulated price for each day; and, it being delivered to him upon those terms, he had the entire possession of it in himself, and was answerable in damages for its detention, or for any injury which might happen to it during his absence. But, supposing the contract should be thought not to extend beyond the three weeks or a month; it is clear that during that time he had at least the legal possession, and then no intention to convert it wrongfully to his own use, arising afterward, whether from necessity or dishonesty, will make the withholding it felony, for the animus furandi must exist at the time the property is obtained. In all the leading cases upon this subject of constructive felony, there has always been some evidence of a tortious conversion; but in this case it has not been proved that the prisoner has disposed of the chaise. It may be at this very moment in his possession, for anything that appears to the contrary, and a conversion cannot be inferred from his having neglected to return it.

THE COURT. The court is bound by the determination of former cases. It is now settled that the question of intention is for the consideration of the jury; and in the present case, if they should be of opinion that the original hiring of the chaise was felonious, it will fall precisely within the principle of Pear's Case and the other decisions which the judges have made upon the subject of constructive felony. If there was a bona fide hiring of the chaise, to pay so much for every day for the use of it, and a real intention of returning it, a subsequent conversion of it cannot be felony, whether the time for which it was hired be limited or indefinite; for by the bona fide contract, and subsequent delivery, the prisoner would have acquired the lawful possession of it, and therefore, although he afterwards abused that trust and that possession, felony could not ensue, because the original taking was lawful. But, on the other hand, if the hiring was only a pretense made use of to get the chaise out of the possession of the owner, without any intention to restore it or to pay for it, in that case the law supposes the possession still to reside with the owner, though the property itself is gone out of his hands, and then the subsequent con-

version will be felony. The case of *The King v. Pear* was very solemnly debated at Lord Chief Justice De Grey's house; and the unanimous opinion of the judges was at last that the direction given to the jury by the learned judge who tried the prisoner was right. The most important part of the argument turned upon the consideration whether the delivery of the horse to Pear had in law divested the owner either of his property or the possession of it. The question left with the jury was whether the contract was meant fairly, or whether it was a mere color and pretense. The jury found that it was a mere color and pretense, and upon that finding the judges determined the taking to be felony, because it is an established principle of law that the possession of property cannot be obtained through the medium of a fraud. But it has been attempted to distinguish the present case from *The King v. Pear*: First, that the hiring in this case was indefinite, but that in *The King v. Pear* it was certain and limited. The time cannot be material in questions of this nature. Pear hired the horse in the morning, under the pretense of going to Sutton, in Surrey, and to return in the evening; but, as the hiring was found to be felonious, the law of the case must have been the same, although it had appeared that the hiring was for two days, a week, a month, or any other given time—nay, if the time had been left entirely unlimited. The circumstances of the time being long or unsettled may, indeed, render the proof of guilt more difficult, but cannot alter the law of the case. Secondly, it is said that this case differs from *The King v. Pear*, because it was proved that Pear had sold the horse, and therefore had converted it to his own use, but that in the present case no proof has been given that the prisoner has sold or otherwise converted the chaise. Proof of actual conversion certainly is not necessary, but the jury must judge of it from the circumstances of the case. If the prisoner, at any time before the prosecution was commenced, had offered to restore the chaise to the owner, or to pay him for it, such conduct would have been evidence of an honest intention when he originally hired it, and would have reprobated the idea of a fraudulent design. But he hires the chaise for a month, and a year passes, and neither the chaise nor the man are heard of until he is taken. There is no evidence even at this moment that the chaise is forthcoming, nor does any one pretend to know where it is. This, therefore, raises a presumption against the prisoner, which it is incumbent on him to repel; and, if he cannot, it will be for the consideration of the jury, under all the circumstances of the case, whether they think he has feloniously disposed of it, or otherwise converted it to his own use. In their determination of this point they must recur to the time of the original hiring, and to the nature and meaning of the contract then made between the parties. If they think the redelivery of the chaise formed any part of the contract, the nondelivery of it must necessarily form a part of their consideration. They will then consider whether the nondelivery is sufficient evidence to satisfy their consciences

that he has converted it to his own use. These two considerations will naturally lead to a third, viz., whether the property thus converted was originally obtained with a felonious design, which will carry them back to the instant of time that he obtained possession of it; and, if they should find the original hiring was felonious, the most ingenious subtlety cannot distinguish this case from that of *The King v. Pear*. There is a case in *Kelynge* of a person who took a lodging in a house, and afterwards at night, while the people were at prayers, robbed them. The jury found that the intention of taking the lodging was to commit the felony, and the judges determined that this was burglary. There was also a case determined very lately by the judges. A man ordered a pair of candlesticks from a silversmith to be sent to his lodgings. They were sent to his lodgings, with a bill of parcels; but he contrived to send the servant back, and to keep the goods, and this was held to be felony, although they were delivered with the bill of parcels, under an expectation of being paid the money, for the jury found that it was a pretense to purchase, with intention to steal.

The question of original intention was left with the jury, and they found the prisoner guilty. A motion was made in arrest of judgment, but it was overruled, and he received sentence of transportation for seven years.²

REGINA v. HEHIR.

(Queen's Bench Division, 1895. [1895] 2 Ir. R. 709.)

Denis Hehir was indicted for the larceny of a £10 note, of the goods and chattels of one John Leech. It appears from the evidence that this £10 note was handed by Leech to Hehir in part payment of a sum of £2. 8s. 9d. due by the former to the latter, and that, at the time when it was so handed, both Leech and Hehir believed it to be a £1 note. It further appears that, after the lapse of a substantial period of time, Hehir became aware that the note was one for £10, whereupon, in the words of the case, "he fraudulently and without color of right intended to convert the said note to his own use, and to permanently deprive the said John Leech thereof, and that to effectuate such intention the said prisoner shortly afterwards changed the said note and disposed of the proceeds thereof."

The case was left by the Lord Chief Baron to the jury (who found the prisoner guilty), in order to obtain an authoritative decision up-

² Accord: *Reg. v. Janson*, 4 Cox, C. C. 82 (1849); *Reg. v. Brown, Dears.* 616 (1856); *Reg. v. Thompson*, Leigh & C. 227 (1862).

"It is quite immaterial whether a man obtains possession of property, with intent to convert it to his own use, by means of a trick, or whether he gets it with the like intent, by placing himself in a convenient position, where it is probable that he will be intrusted with it." Pollock, C. B., in *Reg. v. Thompson*, Leigh & C. 225 (1862).

on a question upon which the Court for Crown Cases Reserved in England was equally divided in *The Queen v. Ashwell*, 16 Q. B. D. 190. That question he reserved for this court in the following words: "Whether I ought to have directed a verdict of acquittal by reason of the prisoner not having had the *animus furandi* when Leech handed him the £10 note?"¹

GIBSON, J.² What we have to deal with is common mistake of identity of such a character as excludes the mutual assent necessary to the existence of contract. That the subject-matter is money can make no difference in this respect. No doubt if the taker cashed the note, and gave the owner back the change, his conduct in so doing would displace *animus furandi*. But on the question of consent and no consent, on which the determination of trespass depends, I cannot discern any substantial difference between a bank note and any other chattel. A bank note indorsed by the Duke of Wellington might have a fancy value, and a person getting it by mistake could hardly insist on holding it, if he chose to pay the difference in face value.

For the purpose of the inquiry I shall assume it as unquestionable law that, as a common-law offense, larceny involves an unlawful violation of possession and that it cannot be committed where possession has been acquired in its origin lawfully. I shall confine myself to two points: The first, the effect of mistake—considered from the receiver's side—on the acquisition of possession; the second, the effect of mistake—considered from the owner's side—on the question of the lawfulness of such acquisition. The solution of both these questions ultimately must depend on the effect and meaning of consent of the taker on the one hand and of the owner on the other, but it is convenient to discuss them separately.

First, as to the acquisition of possession. What is to be examined is legal possession, as distinct on the one hand from physical or apparent possession, sometimes called custody or detention, and on the other from right to possess, or ownership. A man is holding an umbrella. He may have it as owner, thief, or servant. So far as external appearances go, there is no difference, yet as owner or as thief he would be in legal possession. As owner, he would be in lawful possession; as servant, he would not be in possession at all. Why is this? Because possession denotes, in addition to a material, a legal and mental relation. In Roman law, possession meant the occupation of anything with the intention of exercising rights of ownership in respect of it. "*Apiscimur possessionem animo et corpore, neque per se animo aut per se corpore.*" Dig. 41, 2, 3, 1. The definition in Sir J. Stephen's Digest also introduces the element of intention. I have no doubt that in English law physical occupation is

¹ Part of this case is omitted. The facts are printed from the opinion of Madden, J.

² Part of the opinion is omitted.

not identical with possession. If it were, a servant would be possessed of his master's chattel; whereas, we know that the possession is the master's. The analysis of the legal conception of possession, though to a lawyer familiar, wears an appearance of subtlety; but in real property cases I have never found any difficulty in conveying to a jury how acts, physically identical, may be distinguished, according to the rights, relations, intent, and circumstances of parties, as vesting or divesting possession, or as not having that effect. *Leigh v. Jack*, 5 Ex. D. 264; *Pollock & Wright on Possession*, *passim*. For some purposes, and in some relations, as in case of trespass (*Riley's Case*, Dears. C. C. 640), apparent possession may be tantamount to legal possession as possession may be relative. As a general rule, however, legal possession imports knowledge and consent. When Joseph replaced in his brethren's sacks, without their knowledge, the price of the corn they had bought, though they had apparent dominion and control over the sacks, with their contents, they were no more, before discovering it, in possession of the money which Joseph had put in by an act of trespass, than they would have been of dynamite secretly placed there.

In the present case there was a physical delivery, in intended performance of a contract, without knowledge or intent on the part of the owner to give, or on the part of the taker to accept, possession of the particular chattel actually delivered. Until discovery by the taker, the legal possession seems not to be divested out of the owner, if it be not in suspense. Until knowledge and election, the law ought not to attribute to the taker an intent to divest the owner's possession without his consent, which would be a wrongful act, or to accept a possession which in case of some chattels might be onerous. The physical occupation raises an inference of legal possession, just as it does of property of which possession is part and symbol; but common error, which rebuts contract, also rebuts that inference. The character of the physical possession is ambiguous until discovery, and ought to be interpreted in an innocent rather than a tortious sense. If, upon discovery, the taker elects to return the chattel to the proper custody, as it is his duty to do, his previous relation to the chattel is thereby determined, as resembling custody rather than possession. On the other hand, if he then decides to misappropriate, knowing that there has been no consent by the owner, one of two views is possible. His possession up to that time may be regarded as incomplete, and is then finally determined by his tortious election as wrongful throughout. *Woodward's Case*, L. & C. 122. Or he may be regarded as then and there for the first time taking out of the owner's possession the chattel which is to be considered as mislaid rather than as lost. During the suspense period, his acts done in innocent ignorance are excused; but the excuse, founded not on consent, but on misleading, applies only as far as he is misled, and does not operate when,

knowing the mistake, he deliberately commits a tort by taking possession of and converting the chattel.

The second question for consideration is the lawfulness of possession, where the delivery has taken place under a common mistake of such a character as to exclude the mental agreement necessary to the formation of a contract. The mistake may be as to the identity of the transferee (*Cundy v. Lindsay*, 3 App. Cas. 459), or as to the identity of the subject-matter of contract, as in *Middleton's* and *Ashwell's Cases*, or a mistake compounded of both these elements.

It may be taken that a consent to possession obtained by fraud or force, *animus furandi*, is unavailing, and that possession under it would be unlawful and trespassory. It is also certain that in such a case as we have here to deal with property cannot pass. If common mistake prevents contract, and property cannot pass, why should possession, which is part and symbol of property, pass, when neither party intended to divorce possession from property? Physical delivery by owner to taker may be evidence of consent; but delivery can hardly be conclusive and irrebuttable proof of an intelligent transfer of possession, when neither party intends to make or accept such transfer.

Apart from *Ashwell's Case*,³ 16 Q. B. D. 190, I am aware of no direct authority on this point. In *Middleton's Case*, L. R. 2 C. C. 38, the majority of the court thought that possession was taken *invito domino*, because, though no fraud was practiced, the prisoner at the moment of delivery was aware of the mistake and had *animus furandi*. On consideration, I think that *animus furandi* is distinct from, and is not a necessary part of, trespass, and that, even without *animus furandi*, a taker, who at the instant of delivery is aware of the mistake, cannot rely on a consent which he then knows did not in any true sense exist. If the origin of his possession is trespassory, subsequent misappropriation would make him a felon. Why is it that the knowledge of the owner's mistake by the taker prevents his relying on consent? It is not because the taker acts fraudulently, for he may have no dishonest intent, but because in that case the taker is not misled.

I agree with Baron Bramwell, in *Middleton's Case*, L. R. 2 C. C. 56, that the state of the owner's mind as to consent cannot be governed by the state of the taker's mind as to knowledge of mistake or felonious intent. Take the following illustrations:

1. A principal receives from an agent a £10 note in mistake for a £5 note. He sees the mistake and says nothing, intending, without

³ In *Reg. v. Ashwell* the Court for Crown Cases Reserved was equally divided on the question of the guilt of the prisoner on a similar state of facts. Those judges who were in favor of conviction were of opinion that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession, and, as at that time he determined to deprive the owner of his property, there was a concurrence of act and intent. See *Reg. v. Flowers*, 16 Cox, C. C. 33 (1886).

any felonious intent, to give the agent a fright for his carelessness. He afterwards keeps and dishonestly converts the note.

2. A principal, to test his agent's honesty, hands him a £10 as if in mistake for a £5 note. The agent, believing that the principal is really making a mistake, dishonestly keeps the note. In these cases how can the consent of the owner depend on the knowledge and intent of the taker?

This question of consent is one of substance, and not form. It cannot be treated as disposed of by the fact of physical delivery without more. A delivery by a man in delirium or asleep, or hypnotized, would be void, because unaccompanied by intelligent volition. The mistake, as it occurs to me, made by many of the learned judges in *Ashwell's Case*, 16 Q. B. D. 190, seems much the same as that which was corrected in *Reg. v. Dee*, 14 L. R. Ir. 468. A consent must be to the particular act or thing and to the particular person. A consent to intercourse obtained by fraudulent personation from a married woman, in the belief that the act was marital connection with her husband, was, as there pointed out, no consent at all to an act of adultery with a stranger. This absence of consent does not, I think, depend on fraud. It is a conceivable case that a married woman might, in the dark, submit to a man whom she believed to be her husband, without guilty intent on his part, from a mistake of rooms or otherwise. In a civil action for assault I doubt that he could justify his possession of the woman by leave and license, though, of course, from absence of *mens rea*, he would not be guilty of rape.

It may, however, be said that, irrespective of consent, if the taker of a chattel delivered under mistake is protected by a kind of estoppel, he is to be deemed, as against the owner, to be lawfully in possession while such estoppel continues; that is, until the mistake becomes known to him. This suggestion (which has caused me more difficulty than any other point), I think, is founded partly on a confusion of physical possession, or custody, with legal possession, and partly on a misunderstanding arising from the use of the word "estoppel"—an expression which is likely to cause misconception. Until discovery, the relation of the taker to the chattel, which he holds without consciousness of its identity, is, against the owner, custody or detention only. So far as he has acted under the mistake, he is protected. This protection extends to his custody of the chattel and to his conduct in parting with the chattel, if he has done so. The delivery under mutual mistake of identity does not work an estoppel in the sense that the property must be taken to pass. But the taker is excused in respect of everything attributable to the mistake for which the owner is responsible. While the chattel remains in the taker's hands, he is under a duty to give it up on demand. His detention of the chattel till discovery is lawful; but it is not necessary for his protection that such physical detention

should be enlarged into possession, though, if he had parted with the chattel in ignorance, he would be protected even as to the property, notwithstanding that, by reason of the nonexistence of contract, the property had not passed to him. It appears to me that the lawfulness of the detention while the mistake as to identity continues does not draw with it as a consequence that upon discovery the taker can lawfully turn detention into possession and appropriate the chattel. The protection given to mistake does not extend to fraud. There are many cases in which a taker would be under no responsibility or duty to the owner where willful misappropriation on discovery would seem to be theft.

A word as to the authorities. Of the seven principal cases relating to the question of mistake and possession—that is to say, the two bureau cases, the two post office cases, *Vincent's Case*, 2 Den. C. C. 464, *Middleton's Case*, L. R. 2 C. C. 38, and *Ashwell's Case*, 16 Q. B. D. 190—only two decisions (that is, the post office cases) tell against the view here taken. The second of those cases merely followed the first. They were both decided without argument, and the reasons for the judgment can only be inferred. Mr. Justice Stephen in his Digest, art. 299, and Mr. Justice Cave and other judges in *Ashwell's Case*, 16 Q. B. D. 190, are of opinion that the bureau cases are in direct conflict with the post office cases. Whether this is so or not, I prefer the reasoning of Lord Eldon and Baron Parke to the unargued conclusions in the latter cases, and in my view that reasoning clearly touches the facts before us. In addition to these two decisions, Mr. Fitz Gibbon also relied strongly on the well-known illustration in *Middleton's Case*, L. R. 2 C. C. 45. An explanation of the passage is attempted by Mr. Justice Wright (*Possession*, p. 207), and before us Mr. Bourke suggested that there was an ambiguity as to what the taking by the cabman contemplated in the illustration meant. In any view, however, the dictum cannot bind this court. It was not necessary to the decision, the case was not argued apparently with reference to such authorities as the bureau cases or *Riley's Case*, Dears. C. C. 149, and the misconception of the nature of consent which prevailed before *Reg. v. Dee*, 14 L. R. Ir. 468, will be seen to affect many of the judgments. Counsel for the crown, in support of the conviction, relied on the judgments and reasoning in the bureau cases, some of the reasoning in *Middleton's Case*, L. R. 2 C. C. 45, and in *Ashwell's Case*, 16 Q. B. D. 190, the conviction in which is supported by the opinions of Sir F. Pollock and Sir R. S. Wright in their very learned and acute treatise on Possession, from which I have derived much assistance. The same conclusion is also reached in an American case, *State v. Ducker*, 8 Or. 394, 34 Am. Rep. 590, decided unfortunately only by a single judge. As to the cases upon the finding of lost property, I do not think that they are directly in point, as the chattel here was not lost. I have some difficulty in

reconciling their doctrine, as to the necessity of *animus furandi* being simultaneous with the taking, with *Riley's Case*, Dears. C. C. 149, that trespass followed by subsequent felonious misappropriation is theft, unless the explanation be that *animus furandi* in the former cases is essential to trespass. Nor do I quite see how the reasonable belief of the finder as to the owner being found is a necessary ingredient in trespass at common law, where the finder takes with the intent of converting to his own use whether the owner is found or not, *animus furandi*, and not for the purpose of safe custody.

Legal principle and weight of authority, I think, and common sense and reason, I believe—if I may be excused for introducing such matters into the discussion of a common-law offense—point in favor of conviction. Following their guidance, I must decide that Hehir, who is morally a rogue, is legally a felon according to the law of this kingdom.⁴

JOHNSON, J.⁵ In the present case I fail to find in the initiatory stage “trespass” or anything which the well-defined law considers equivalent to trespass. Leech was Hehir’s pecuniary debtor. He intended to pay his debt with nine shillings in specie and two bank notes. With that intention, or, in the words of the case, reserved “for the purpose of paying this sum,” without application by, or act or word of, Hehir, Leech of his own motion voluntarily handed to Hehir the nine shillings and the two bank notes to pay his debt. Leech’s intention in this act is not capable of positive or mathematical proof; but it is to be implied from his acts, and I have always understood the law to be that a man is taken to intend the necessary and reasonable consequences of his own acts. If Leech did not intend to give Hehir possession of the two particular bank notes which he placed in his hand, what did he intend to give him? Admittedly, and by an “intelligent” act of his own mind, he intended to give Hehir the possession of, and also the property in, one of the two particular notes. What different intention (does it in any way appear) had he then and there as to the other of these two particular notes, both of which, by the same act, at the same instant of time, he gave and intended to give into Hehir’s hand? In *The Queen v. Prince*, L. R. 1 C. C. 150 (one of the strongest cases in the books), Blackburn, J., at page 155, says: “As the law now stands, if the owner intended the property to pass, though he would not so have intended, had he known the real facts, that is sufficient to prevent the offense of obtaining another’s property from amounting to larceny.” That appears to me to be sound law. In the present case the property in the £10 note did not, in my opinion, pass to Hehir; but that is not the question now. If Leech had known

⁴ Madden, Holmes, and Murphy, JJ., delivered concurring opinions.

Accord: *Wolfstein v. People*, 6 Hun (N. Y.) 121 (1875); *State v. Ducker*, 8 Or. 394, 34 Am. Rep. 590 (1880).

⁵ Part of the opinion is omitted.

that the note in question was a £10 note, and not a £1 note, probably he might not in that hypothetical case have handed it to Hehir; but the real question is what, under the then existing conditions, was Leech's intention—not what, under some other imaginary or conjectural circumstances or conditions, might or would have been his intention. I am therefore of opinion, on the facts, that Leech intended to deliver and did deliver possession of the £10 note as well as of the £1 note to Hehir, and, further, that in the then condition of his mind and knowledge he intended to pass the property in each of the two notes to Hehir, and did not intend to make any difference either as to possession or property between them, even though the property in the £10 note did not, owing to the mistake, vest in Hehir, and that, on the old and settled principles of the law, Hehir committed no trespass, nor did any act which the law deems equivalent to trespass, when he accepted and received from Leech the note in question; and that, as the case finds that when the note "came to his hands" (3 Inst. 107) "when he first got possession of it distinct from Leech" (2 East, P. C. 655), he had no *animus furandi*, consequently there was no larceny, although subsequently Hehir found out that the note was good, not only for £1, but for £10, and then, retaining the £1 which was due to himself, dishonestly misappropriated the £9 residue of the proceeds of the note, which in law he had received to the use of Leech. This conclusion is supported by the cases cited in argument. In *Reg. v. Mucklow*, Moo. C. C. 160, 1827, a postman called at the house (where the prisoner, James Mucklow, lived with his father, about a dozen yards from St. Martin's Lane) with a letter addressed to "James Mucklow, St. Martin's Lane," where no person of that name was known. The prisoner and his father were out, and the postman left a message that there was a letter for them which they were to send for. In consequence of that message the letter was on the same day delivered to them, and the prisoner found in it a draft which he misappropriated. James Mucklow was convicted of larceny of the draft, and the conviction was held wrong on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter. The draft was not only part of the letter, but was the important chattel, which the letter only covered and conveyed. That case was followed in *Reg. v. Davies, Dears. C. C. 640* (1856), and with these decisions agree the illustration of a person handing to a cabman a sovereign by mistake for a shilling, given in the judgment in *The Queen v. Middleton*, L. R. 2 C. C. 38, in which, in the judgment of seven of the judges, it is said (page 45): "We are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this: Whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent,

the animus furandi." In the present case the property in the £10 note did not, in my opinion, as I have stated, vest in Hehir; but, applying this test, the question is, was Hehir, when he took (received) the £10 note, aware of the mistake, and had he then the guilty intent? On the facts of the present case that issue must be determined in favor of the prisoner. It is erroneously stated in Stephen's Digest of the Criminal Law (note, 3d Ed., p. 228; 5th Ed., p. 262) that the arguments in *The Queen v. Middleton*, L. R. 2 C. C. 38, are not reported. No counsel appeared for the prisoner, but the arguments for the crown by Coleridge, A. G. (Metcalf and Slade with him), are reported in 12 Cox, C. C. 262, and several cases, including *Merry v. Green*, 7 M. & W. 623, were referred to. This case of *Merry v. Green*, 7 M. & W. 623, and also *Cartwright v. Green*, 8 Ves. 405, were much pressed by Mr. Bourke, for the crown, in his very clear argument. In *Cartwright v. Green*, 8 Ves. 405, the owner of a bureau concealed 900 guineas in specie in a secret drawer and died, leaving it undiscovered. Her personal representative, knowing nothing about the money lent the bureau to his brother, who took it to India and brought it back. He knew nothing about the money. Then the bureau was sold to Dick, no one all the time knowing anything about the money. Dick lent the bureau to Green (one of the defendants), a carpenter, for the sole purpose of repairing it. He and his wife and another ransacked the bureau, found the money, secreted it, and converted it to their own use, invito domino, without the will of the owner. It was held this was a felony, and therefore a larceny, and rightly so. First, the 900 guineas were personal chattels contained in, but independent of, the bureau, and forming no part of it. Second, the bureau, and the bureau alone, was delivered by Dick, the owner, to Green, a carpenter, in the way of his trade, for the limited purpose to repair it for Dick. The specie was not delivered or intended to be delivered to Green for any purpose. Third, when Green first discovered the money, he must then reasonably have believed, as well as known, that he could have found the owner either in or through Dick, the owner of the bureau who employed him to repair it, and he from the first appropriated the money to himself. The case was not unlike the old case of a carrier breaking bulk. In *Merry v. Green*, Parke, B., in delivering the judgment of the court ordering a new trial, says: "It is said that the offense cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances, must have known who was the owner, and, instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass." The ground of the new trial was that the question should be left to the jury whether the plaintiff had reason to believe he bought the contents of the bureau (if any), and consequently had a color of right to the property. Therefore neither of these

cases, in my opinion, in the least governs the facts of the present case or impeaches the decisions of *Reg. v. Mucklow*, 1 Moo. C. C. 160, or *Reg. v. Davies*, Dears. C. C. 640, or the illustration of the cabman's case, or the old principle of the law. And it may be observed that the Legislature, as mentioned in 2 Russ. (5th Ed.) 413, has by St. 1 Vict. c. 36, § 31, met (so far as the post office was concerned) such cases as *Mucklow's Case*, 1 Moo. C. C. 160. For other purposes the Legislature has left unaltered the old principle of larceny at common law.

For these reasons I am of opinion that the question submitted by the case should be answered in the negative, and the conviction reversed.

O'BRIEN, J.^a The nature of the criminal law is that it is conversant with acts. People are not punished for temptations. Whose was the act in this case? There was no act but that of the owner; for, according to the argument, the prisoner would have been guilty of larceny if he had simply retained the £10 note after he knew what it was. For the purpose of this view, the period of time during which he was in possession of the note without knowing the amount must be blotted out altogether—not in law merely, but even in physical existence. In fact, it must be considered the same as mere vacancy, and yet, by some curious legal fiction, the offense of the accused is carried back over that vacancy to the time of the first transaction, to satisfy the words of the indictment that he “feloniously took,” when it is certain he did not take. Thus a crime committed to-day is projected forward a month hence, or even it may be a year, to the time when the person conceives the idea of appropriating the article. By the same kind of fiction, the trespass, which, according to the authorities, must exist in the crime, is wholly got rid of—not because the prisoner was innocently possessed until the dishonest intention arose, but because there was no possession. And thus a possession, which did not exist at all when he was innocent, came into existence when he had a guilty mind, so as, without any act but of the mind, to make out that he feloniously took. The prisoner is not a person who obtains something wrongfully by latrocinium, by the direct and conscious invasion, open or secret, of another's right. He is not a bailee. He is not a finder. We must invent a new category. He is a finder out. In other words, he commits a crime by the operation of the mind. But we have still further to go in order to fulfill the definition of larceny. What becomes of the *asportavit*—the other element in the crime? When does the person carry away? Are the taking and carrying away distinct things in this new theory of larceny? Or are they both comprised in what may be a purely mental act—the appropriation? I fear it must be

^a Part of the opinion is omitted.

answered that the asportavit disappears altogether—that there is no room for it and the cepit in the same thought and in the same instant. It may be thought that these are almost ridiculous refinements, but they become so by reason of the refinements they are intended to meet; for we are engaged in pursuing a phantom—an impalpable subtlety that eludes comprehension, and makes thoughts and fictions and relations the rule of conduct as to crime. The law, above all the criminal law, that takes from a man the natural dominion over himself, and delivers him over as a slave to another power for punishment, was made to be understood, as well as to be obeyed.

In my opinion the conviction ought to be reversed.⁷

(B) *Distinction Between Possession and Custody.*

HUSSEY put this question: If a shepherd steal the sheep that are in his care; or a butler the pieces that are in his care; or other servants things that are in their care, if this should be called felony. And it seemed to him that it should, and he cited a case, which was, that a butler had stolen certain stuff that was in his care, and was hanged for it. HOUGH cited the case of Adam Goldsmith, of London, who had stolen certain stuff that was in his care, and was hanged for it. BRIAN: It cannot be felony, because he cannot take them *vi et armis*, since he had the care of them. And the justices were of the same opinion, and hence, there was no discussion, etc.

REPORTER'S NOTE 1487. (Y. B. 3 Hen. VII, 12, pl. 9).

ANONYMOUS.

(Old Bailey, 1664. Kelyng, 35.)

At the Sessions in the Old Bailey, holden there the 12 October, 1664. A silk throster had men come to work in his own house, and delivered silk to one of them to work, and the workmen stole away part of it. It was agreed by HYDE, Chief Justice, myself, and Brother WYLDE being there, that this was felony, notwithstanding the delivery of it to the party, for it was delivered to him only to work, and so the entire property remained then only in the owner, like the case of a butler, who hath plate delivered to him; or a shepherd,

⁷ Sir O'Brien, L. C. J., Palles, C. B., and Andrews, J., delivered concurring opinions. See *Columbia Law Review*, vol. 7, p. 395.

Accord: *Bailey v. State*, 58 Ala. 414 (1877); *Jones v. State*, 97 Ga. 430, 25 S. E. 319, 54 Am. St. Rep. 433 (1895); *Thompson v. State*, 55 S. W. 330 (1900); *Cooper v. Commonwealth*, 60 S. W. 938, 22 Ky. Law R. 1627, 52 L. R. A. 136 (1901).

who hath sheep delivered, and they steal any of them, that is felony at the common law. Vide 13 Eliz. 4, 10; 3 Hen. VII, 12; 11 Hen. VII, 14. Accord: Poulton de Pace, 126.

REX v. PARADICE.

(Court for Crown Cases Reserved, 1766. 2 East, P. C. 565.)

Francis Paradice was indicted for stealing a bill of exchange of £100 value, the property of William Periam. The prosecutor to whom the bill was indorsed was a draper at Devizes, and the prisoner, who was his bookkeeper on a salary, kept his accounts, and received and paid money for him, but did not live in his house, but came every day there to transact his business. The prosecutor delivered the bill in question, with several others, to the prisoner, and ordered him to send them by that day's post, as he had often done before, from the Devizes to the prosecutor's banker in London, as cash to be accounted for to the prosecutor. The prisoner next day asked the prosecutor's leave to go to a town in the neighborhood, which was consented to on condition that he returned the next day by 12 o'clock. The prisoner went to Salisbury, got cash for the bill, which was indorsed by the prosecutor, and next by the prisoner, who was afterwards apprehended at Exeter with part of the bills and the money. GOULD, J., before whom he was tried and convicted, respited judgment to take the opinion of the judges whether this were a felony or a breach of trust. In Easter Term, 1766, all the judges (except Lord CAMDEN, who was absent) held it larceny, upon the principle that the possession still continued in the master.

REGINA v. THOMAS.

(Worcester Assizes, 1841. 9 Car. & P. 741.)

Larceny. The prisoner was indicted for stealing a sovereign, the property of Thomas Hins.

It appeared that the prosecutor and the prisoner, having entered a beer shop, were drinking together, and that the prosecutor, who had agreed to treat the prisoner, took a sovereign out of his pocket for the purpose of paying and offered it to the landlady to change, and upon her declaring her inability to do so she placed it on the table, and the prisoner said, "I'll go and get change." The prosecutor said, "You won't come back with the change," to which the prisoner replied, "Never fear," and, taking up the sovereign, left the house and did not again return. It appeared from the evidence of the prosecutor that he was not aware of the last remark of the

prisoner, nor, at first, that he had gone out with the sovereign; but he had not offered any opposition to the prisoner's taking it, having left the sovereign on the table after his reply to the prisoner's offer.

Streeten, for the prisoner, submitted that the intention of the prisoner was clearly to be collected from the evidence, and that, as it appeared that the taking was with intent to get change, any subsequent felonious intent of converting it to his own use would not constitute a trespass sufficient to render it a felony, and that, the prosecutor having parted with the legal possession of the sovereign, the subsequent appropriation of the money by the prisoner did not amount to larceny.

Huddleston, for the prosecution, submitted that it did not appear by the evidence that the prosecutor had consented to the taking of the sovereign.

COLERIDGE, J. I think that the passive conduct of the prosecutor amounted to a sufficient sanction of the taking.

Huddleston. I submit that the prosecutor had not divested himself of the property in the sovereign by even giving it to the prisoner for change, and that it remained his till it was actually changed.

COLERIDGE, J. (having conferred with GURNEY, B.). It appears quite clear that the prosecutor, having permitted the sovereign to be taken away for change, could never have expected to receive back again the specific coin, and he had therefore divested himself, at the time of the taking, of the entire possession in the sovereign, and consequently I think that there was not a sufficient trespass to constitute a larceny.

Verdict—Not guilty.¹

REGINA v. JONES.

(Monmouth Assizes, 1842. 1 Car. & M. 611.)

Larceny. The prisoner was indicted for stealing a pig, the property of Robert Baker.

It appeared that on Saturday, the 18th of December, 1841, the prosecutor had employed the prisoner to drive six pigs from Cardiff to Usk Fair, which was on the 20th of that month, for which he paid the prisoner six shillings. The prisoner had never before been in the employ of the prosecutor, and had no authority to sell any of the pigs. It appeared that on Sunday, the 19th of December, the prisoner left one of the pigs at Mr. Matthews', of Coed-kernew, to be left till the next night, saying that it was too tired to walk. On Monday, the 20th, the prisoner told the prosecutor at

¹ Accord: Reg. v. Reynolds, 2 Cox, C. C. 170 (1847), disapproved in *Justices v. People*, 90 N. Y. 12, 43 Am. Rep. 135 (1882). Contra: *Murphy v. People*, 104 Ill. 528 (1882).

Usk that he had left the pig at Mr. Matthews' because it was tired; and the prosecutor then desired the prisoner to call at Mr. Matthews' and ask him to keep the pig for him till the following Saturday, and he would pay him for the keep. On Tuesday, the 21st, the prisoner called at Mr. Matthews', and sold the pig to Mr. Matthews for a guinea; and on Thursday, the 23d, he told the prosecutor that he had seen the pig at Mr. Matthews', and that Mr. Matthews would keep it till the following Saturday.

CRESSWELL, J. Is this a larceny?

Greaves, for the prosecution. The difficulty is that the prisoner did not sell the pig at the time he left it, but left it because it was tired, and sold it when it was no longer in his possession.

CRESSWELL, J. There is no evidence that the prisoner had any intention to steal the pig when he received the six pigs to drive.

Greaves. I submit that this is not necessary, as the prisoner had merely the custody of the pigs, and that if he had sold one of the pigs on the road it would have been larceny. In the case of *Rex v. McNamee*, M. C. C. 368, Brit. C. C. vol. 2, it was held that if a man who is hired to drive cattle sell them it is a larceny, although it be found by the jury that he did not intend to steal the cattle at the time he took them into his charge, because he has only the custody of the cattle, and not the right of possession. So in the case of *Regina v. Harvey*, 9 C. & P. 353, 38 E. C. L. R. 150, where the owner of goods employed a person not in his service to take them to a particular place, show them to a customer, and bring them back, but did not authorize him to sell them or leave them with the customer, and he, instead of taking the goods to the place specified, sold them for his own advantage, it was held that this was a larceny, as he had the custody, and not the possession, of the goods.

CRESSWELL, J. The judges appear to have acted lately on a very nice distinction. If a man is allowed to have the possession of a chattel, and he converts it to his own use, it is not larceny, unless he had an intention of stealing it when he obtained the possession of it; but, if he has merely the custody of a chattel, he is guilty of a larceny if he disposes of it, although he did not intend to do so at the time when he received it into his custody.¹ Here it appears that the prisoner left the pig on Sunday, the 19th, and if nothing more had appeared I should have held that Matthews kept it merely for the prisoner; but on Monday, the 20th, he told the prose-

¹ "Various opinions formerly prevailed whether servants, having the custody of their master's goods, were guilty of felony by fraudulently embezzling them, and converting them to their own use; but St. 21 Hen. VIII. c. 7, which makes this offense felony, does not say that it was not felony before by the common law, but only recites that the matter had been doubted, and this act of Parliament did not, in my judgment, mean to weaken, but to assist, the common law. Ever since this act, therefore, the opinion of those who before the act held that servants embezzling their master's property was felony has been confirmed." Gould, J., in *Rex v. Wilkins*, 1 Leach (4th Ed.) 523 (1789).

cutor that he had left it there, and the prosecutor told him to ask Matthews to allow the pig to remain there till the Saturday. The prosecutor thus consented to Matthews being the keeper of the pig for him, and therefore his custody became the custody of the prosecutor, and then the prisoner goes and sells the pig to Matthews. I think that the prisoner must be acquitted.

Verdict—Not guilty.

PEOPLE v. CALL.

(Supreme Court of New York, 1845. 1 Denio, 120.)

BEARDSLEY, J.¹ According to the evidence, as stated in the bill of exceptions, the note was handed to the prisoner for a special purpose; that is, to indorse upon it a payment which had then been made. He appeared to be making the indorsement, but then folded up the note and with it left the house.

As every larceny includes a trespass, the taking must be from the possession of another person. But here it is necessary carefully to discriminate between what constitutes, in law, a possession of property, and that which amounts only to its care and charge.

A servant has the charge, but not the possession, of his master's goods. The possession is in the master, and the servant may commit larceny by converting the property, with which he is thus intrusted, to his own use. This principle applies to servants, strictly so called, as it also does to apprentices, clerks, and workmen of every description, who are employed in the care and management of the owner's property, under his immediate supervision and control.

Where possession of the property is obtained by one as a bailee or purchaser, although by trick and fraud, the case stands on other grounds, but which need not now be stated. The note was not received by the prisoner as a bailee, or a purchaser, but for the mere purpose of doing for the holder what he was about to do for himself. The indorsement would be the act of the holder, although made by the hand of the prisoner. It was to be done under the immediate direction and control of the owner, and could only be made by the prisoner as servant or agent of the person for whom he was acting. As the note was thus received by the prisoner as a servant of the holder, the legal possession was not changed. The prisoner was in charge of the note while making the indorsement, but the owner still had possession.

It was unnecessary, therefore, that the jury should have found the existence of a felonious intent, when the prisoner received the note. If it came upon him after the note had been received, and while he was engaged in making the indorsement, or subsequently,

¹ Part of this case is omitted.

and was carried into effect by converting the property to his own use, it was larceny. The charge, therefore, was not strictly correct, in requiring the jury to find the *animus furandi* at the time when the note passed into the prisoner's hands. It was enough that it existed while he held it as servant to the owner.* A felonious conversion under such circumstances was, in law, a felonious taking from the owner.

The charge of the court virtually required the jury to find a felonious intent at the time of conversion, as it did expressly at the time the prisoner received the note. The last requisite of the charge was erroneous; but it was an error which could not prejudice the prisoner. It required the jury to find more than the law made necessary to warrant his conviction of the offense; but of that he cannot complain, and a new trial should be denied.

New trial denied.

REGINA v. SAWARD.

(Central Criminal Court, 1851. 5 Cox, C. C. 295.)

The prisoner was indicted for larceny.

It appeared that he was employed by the prosecutor, who was a tarpaulin manufacturer, to make up for him canvas bags. The canvas was cut out by the prisoner, at the prosecutor's shop, and taken away by him, and it was his duty to make it up at his own house and bring back the bags complete. A portion of a large quantity of material received by him was worked up and brought back to the prosecutor. The remainder he pawned, and appropriated the money to his use.

THE RECORDER (after consulting Mr. Justice CRESSWELL). An extremely nice point of law arises in this case. If, under ordinary circumstances, a servant has possession of his master's goods, the possession of the servant is the possession of the master, and if he makes away with the property he is guilty of larceny. But a very refined distinction has been taken between the case of a servant having goods of his master's upon his master's premises and having them to work up upon his own. He is, in the latter case, considered, not in the light of a servant, but in that of a bailee. If he then makes away with the property, he is guilty of a fraud, but not of a larceny. If, on the other hand, a servant so intrusted were to separate a portion of the goods, and dispose of them to his own use, then the very act of separating them would determine the bailment. He would no longer be in lawful possession of those he had so separated with a fraudulent intent, and would therefore be guilty of larceny in converting them. Here it appears the prisoner had separated and made up a portion of the materials, which would be a lawful act. His pawning the rest, therefore, would not render

him guilty of larceny. I have consulted Mr. Justice CRESSWELL on the subject, who, after some hesitation, thinks that the jury should be directed to acquit the prisoner.

Verdict—Not guilty.

PEOPLE v. MONTARIAL.

(Supreme Court of California, 1898. 120 Cal. 691, 53 Pac. 355.)

Louis Montarial was convicted of grand larceny in stealing certain moneys from one Paillac, and appeals. The evidence showed that Montarial and Paillac were roommates, and that the latter gave the defendant the money in question, done up in a package, to be placed for safe-keeping in defendant's trunk. Defendant placed the money in the trunk, where it remained for over two years. Defendant carried the key, but always unlocked the trunk at the request of Paillac. Defendant had no authority to handle the package except in the presence of Paillac, and then only for the purpose of handing it to Paillac or replacing it at his direction.¹

VAN FLEET, J. Taking the whole evidence together, with all it tends to show, and we are satisfied that it does not establish a bailment or intrusting of the money to defendant. As we regard it, the evidence does not show that Paillac ever in fact really parted with the possession of his money. While it was locked in the trunks of defendant, to which the latter retained the keys, the trunks were at all times as much in the possession of Paillac, and with practically the same freedom of access to the latter, as in that of the defendant. In legal contemplation the use of the trunks was loaned or given to Paillac as a place for keeping his money. The mere fact that defendant carried the keys is not a material consideration. As we have seen, the keys were always forthcoming when demanded by Paillac for access to his money; and the money was, therefore, to all practical intents and purposes, as much under his personal supervision and protection as of defendant. Indeed, more so, since the latter had no right or authority to tamper with it in any way, except as directed by its owner.

Much is made by defendant of the fact that Paillac testified that he "intrusted" the money to defendant; and it is urged that this constitutes embezzlement, because that offense consists of "the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. But, to reach the meaning of the witness, his expressions must be read in the light of his whole testimony and all the circumstances; and when so read it is clear that his money was not intrusted to the keeping of the defendant in a

The statement of facts is abridged from the opinion of the court, and part of the opinion is omitted.

manner to bring it within the definition of embezzlement. Defendant let Paillac have the use of his trunks as a place of safety for his property, and the only dominion defendant rightfully exercised over it was a perfunctory handling of it in the presence of the owner. The case, although differing in its circumstances, is not to be distinguished in principle from that of *People v. Johnson*, 91 Cal. 265, 27 Pac. 663, where it is held that, where the owner puts his property into the hands of another to do some act in relation to it in his presence, he does not part with the possession of it, and the conversion of it *animo furandi* is larceny, and not embezzlement. See, also, 2 Russell on Crimes (8th Am. Ed.) 21.

We are satisfied that the judgment should be affirmed.

(C) *When Delivery Vests Property.*

REGINA v. STEWART.

(Kent Assizes, 1845. 1 Cox, C. C. 174.)

The prisoners were indicted for larceny, under the following circumstances: They passed for husband and wife, and, having taken a house at Tunbridge Wells, Mrs. Stewart went to the shop of the prosecutor, selected the goods in question to the amount of £10, and ordered them to be sent to her home. The prosecutor accordingly dispatched the goods by one Davies, and gave him strict injunction not to leave them without receiving the price. Davies, on arriving at the house, told the two prisoners he was instructed not to leave the goods without the money, or an equivalent. After a vain attempt on the part of K. Stewart to induce Davies to let him have the property on the promise of payment on the morrow, he (Stewart) wrote out a check for the amount of the bill and gave it to Davies, requesting him not to present it till the next day. It was drawn on the London Joint Stock Bank, Prince's Street, London, and Davies, having left the goods, returned with the check to his employers. It was presented at the Bank, in London, the next morning, when it was dishonored for want of effects. It was also proved that, although the prisoner had opened an account at the said bank, it had been some time before overdrawn, and several of his checks had been subsequently dishonored.¹

Jones, Serjt., then submitted that the charge of larceny against Kidman Stewart could not be sustained. The shopman parted, not only with the possession of the goods, but also with the property in them. Nor was any false representation made to him to induce him so to do. The prisoner requested that the check might not be presented until the next day; but it was presented on the

¹ Part of this case is omitted.

next morning, and had never been taken to the banking house since. Although there were no funds there in the morning, it did not follow that provision might not have been made for the check in the course of the day. This is like the case of *R. v. Parker*, 7 C. & P. 825, where the prisoner was charged with falsely pretending that a postdated check, drawn by himself, was a good and genuine order for £25, whereby he obtained a watch and chain. There the prisoner represented, as here, that he had an account with the bank, and had authority to draw the check, both which were proved to be false, and the court held the case one of false pretenses.

ALDERSON, B. It is for you to show that the prisoner had reasonable ground for believing that the check would be paid. The case seems to me to approach more nearly to *R. v. Small*, 8 C. & P. 46, than to *R. v. Parker*. In the former, a tradesman was induced to send his goods by a servant to a place where he was met by the prisoner, who induced the servant to give him the goods in exchange for a counterfeit crown piece, and it was held to be larceny. If the owner of goods parts with the possession, he meaning to part also with the property, in consequence of a fraudulent representation of the party obtaining them, it is not larceny, but a mere cheat. But if the owner does not mean to part even with the possession, except in a certain event, which does not happen, and the prisoner causes him to part with them by means of fraud, he (the owner) still not meaning to part with the property, then the case is one of larceny. Here, if the owner had himself carried the goods and parted with them, as the servant did, no doubt it would have been a case of false pretenses; or, if the servant had had a general authority to act, it would have been the same as though the master acted. But in this instance he had but a limited authority, which he chose to exceed. I am of opinion, as at present advised, that if the prisoner intended to get possession of these goods by giving a piece of paper, which he had no reasonable ground to believe would be of use to anybody, and that the servant had received positive instructions not to leave the articles without cash payment, the charge of larceny is made out.²

² Accord: *Rex v. Longstreeth*, Moody, 137 (1826); *Rex v. Small*, 8 Car. & P. 46 (1837); *Reg. v. Sheppard*, 9 Car. & P. 121 (1839). See, also, *Reg. v. Simpson*, 2 Cox, C. C. 235 (1847); *Shipply v. People*, 86 N. Y. 375, 40 Am. Rep. 551 (1881); *State v. Hall*, 76 Iowa, 85, 40 N. W. 107, 14 Am. St. Rep. 204 (1888); *Commonwealth v. Eichelberger*, 119 Pa. 254, 13 Atl. 422, 4 Am. St. Rep. 642 (1888).

REGINA v. WILSON.

(Stafford Assizes, 1837. 8 Car. & P. 111.)

Larceny. The prisoners were indicted for stealing a £5 note and two sovereigns, the property of Robert Parker.

Mr. Robert Parker said: "I am a farmer. I was, on the 20th of June, walking towards Walsall, when I saw the prisoner Peter Wilson. He pointed to the ground and said: 'There is a purse.' He picked it up. I said: 'We had better have it cried, as some one may own it.' He replied: 'Some one to whom it does not belong may say it is his, and get it from us.' We walked on, and I said: 'We had better see what the purse contains.' He replied: 'Not here, as there are men at work who will see us.' We went about 20 yards further, and the prisoner Wilson opened the purse and took out what appeared to me to be a gold watch chain and two seals. He said he did not know the value of them, but there was a gentleman on the other side of the road who could probably tell us. This was the prisoner Ambrose Martin. The things were shown to him, and he said he was in the trade, and asked how we came by the articles. I said we had found them. The prisoner Martin then said it was a very prime article, and worth £14, and that we should divide it between us, and he added that, as we found it on the road, it belonged to us, and no one else. The prisoner Wilson said he would take the things to his master; but the other prisoner said he had no right to do so, and he also said that if I would buy the other man's share he would give me £18 for the articles, and get a good profit for himself besides. He added that he was the brother of Mr. Dutton, the watchmaker, whom I knew. The prisoner Wilson had gone on a little way, when he was called back by the other prisoner, who asked him if he would take £7 for his share. This he agreed to do. I gave him a £5 note and two sovereigns, and took the chain and seals."

Evidence was given to show that the prisoners were connected together, and that the supposed valuable articles were worth only a few shillings.

COLERIDGE, J. Is this a larceny?

Beadon, for the prosecution, cited the case of *Rex v. Moore*, 2 East, P. C. 679.

COLERIDGE, J. In that case nine of the judges thought that the money charged to have been stolen was given as a pledge, so that the possession of it only was parted with by the prosecutor, and the property not. In this case the prosecutor intended to part with the money for good and all, and to have the articles. If the party meant to part with the property in the money, as well as the possession of it, I am of opinion that it is no larceny. Here the prosecutor meant to part with his money for ever.

Beadon cited the case of *Rex v. Robson*, R. & R. 413.

COLERIDGE, J. The party there had only the possession of the money given to him as a stakeholder. When this prosecutor parted with his £7, he never intended to have it back again, but meant to sell the chain and seals for himself. The prisoners must be acquitted.

Verdict—Not guilty.

REX v. NICHOLSON.

(Court for Crown Cases Reserved, 1794. 2 Leach, C. C. [4th Ed.] 610.)

Nicholson and others were indicted for stealing two bank post bills, the one of £20 the other of £15, and seven guineas, the property of William Cartwright. It appeared that the prisoner Nicholson introduced himself to the prosecutor without any previous acquaintance, at his apartments in the Charter House, under pretense of inquiring what the rules of the charity were. He discovered that the prosecutor had some money, by his desk having been opened during the conversation. Nicholson desired him to walk with him, and they went to a public house, having been joined by the prisoner Chappel. Some liquor was called for, when the other prisoner, Jones, came into the room, and said he had come from Coventry to receive £1,400, and produced a quantity of notes. Chappel said to him: "I suppose that you think that no one has any money but you." Jones answered: "I'll lay £10 that neither of you can show £40 in three hours." They all went out, Nicholson and Chappel saying they should go to the Spotted Horse, and both asked the prosecutor if he could show £40. He answered he believed he could. Nicholson accompanied the prosecutor to his room at the Charter House, where the prosecutor took out of his desk the two post bills in question and five guineas. Nicholson then advised him to take a guinea or two more, and he accordingly took two more. They then went to the Spotted Horse, where Jones and Chappel were in a back room. Jones put down a £10 note for each who could show £40. The prosecutor showed his £40 by laying down the notes and guineas, but did not recollect whether he took up the £10 given to him. Jones then wrote four letters with chalk on the table, and going to the end of the room turned his back, and said that he would bet them a guinea apiece that he would name another letter which should be made and a bason put over it. Another letter was made and covered with a bason. Jones guessed wrong, and the others won a guinea each. Chappel and Nicholson then said: "We may as well have some of Jones' money, for he is sure to lose; and we may as well make it more, for we are sure to win. The prosecutor staked his two notes and the seven guineas. Jones then guessed right; and, the notes

lying on the table, Jones swept them all off, and went to the door of the room, the other prisoners sitting still. A constable immediately came in and apprehended the prisoners. The prosecutor said on cross-examination, that he did not know whether the £10 note given to him by Jones on showing £40 were a real one or not; that having won the first wager by guessing the letter, if the matter had ended then, he should have kept the guinea; that he did not object to Jones taking his £40 when he lost, and would have taken the £40 if he had won. The officers who had taken the prisoners, having searched them, found a great many pieces of thin paper upon them, having numbers, such as 100, 50, etc., something in the manner of bank notes, the bodies of the notes being advertisements of different kinds. No good notes were found upon them, but about eight guineas in cash, a sum sufficient to have paid £40 if Jones had lost the wager. A lump of paper was put into the prosecutor's hands by Jones when the officers came in, which was afterward found to contain the two genuine post bills mentioned in the indictment.¹

Knowllys, for the prisoner, submitted to the court that there was a material distinction between this case and the common cases where money is obtained by means of ring dropping; that in ring dropping cases the property obtained, though voluntarily on the part of the prosecutor, was not by an absolute, but conditional, delivery, so that, until something else took place, the property was not intended to be parted with, and therefore a constructive possession still remained in the prosecutor. But in this case the money was lost, and the prosecutor really supposed it to be so, and parted with it absolutely, without anything being to be afterwards done by the party, or without any expectation of its being to be returned to him again in any event whatever.

THE COURT was of opinion that it was for the jury to judge, from all the circumstances of the case, whether the prisoners had not a dominion over the property of Cartwright from the very beginning of the transaction, and whether all that followed were not merely means made use of to get his money into their possession.

The jury found the prisoners guilty, and that it was not a gaming transaction, but a preconcerted scheme in all the prisoners to get from the prosecutor the notes and money; but the judgment was respited, and the case submitted to the consideration of the twelve judges.

In Hilary Term, 1794, all the judges held the conviction wrong, for that in this case the possession itself, as well as the property, had been parted with by the prosecutor, under an idea that it had been fairly won; and the prisoners received a free pardon, and were discharged previous to the April Session, 1794.²

¹ The facts are printed from 2 East, P. C. 669.

² Compare *Reg. v. Riley*, 1 Cox, C. C. 98 (1844).

REX v. ROBSON.

(Court for Crown Cases Reserved, 1820. Russ. & R. 413.)

The prisoners were tried and convicted before Mr. Justice BAYLEY, at the Lent Assizes for the town and county of Newcastle-upon-Tyne, in the year 1820, of stealing from the person of John Younger 20 notes for one guinea each.

The facts were as follows: Robson, by pretending to find a sixpence in a fair, decoyed Younger to a public house. They were then joined by the three other prisoners, and after a little time Gill, pretending to be flush of money, began to play with Fewster, at guessing at a halfpenny Fewster hid under a pewter pot. Gill was to guess three times right out of four. After losing twice, Gill offered a wager of a pound that none of them could produce £10. Fewster took the bet, and advised Younger to do the same. Younger had not money enough about him, but went and borrowed 20 guinea notes of a friend, and then it was conceded he had won. Gill then offered Fewster to bet him £100, or £50, or any other sum, that he guessed the halfpenny right three times out of four, and Fewster betted him £40. Gill guessed wrong once out of the four times, and then went out. In his absence, Fewster advised Younger to go halves in the bet, as he was sure to win, and after some persuasion he consented; and on Gill's return Younger handed the 20 guinea notes to Gill, who passed them on to Robson, who was to be stakeholder. Gill then pretended to guess the remaining three times, and, being right in each, Robson gave him the stakes and he went away.

The learned judge told the jury that if they thought, when Gill took the notes from Younger and passed them to Robson, there was a plan and concert between the prisoners that Younger should never have his notes back, but that they should keep them for themselves, under the false color and pretense that Gill won his bet, he was of opinion that in point of law it was a felonious taking by all.

The jury were of that opinion; but, as this case came very near to *Rex v. Nicholson*, 2 East, P. C. 669, the learned judge thought proper to submit it to the consideration of the judges, although his lordship was of opinion that it was distinguishable from that case.

The distinction the learned judge took between the cases was this: That, at the time Gill and Robson took Younger's notes, Younger parted with the possession only, not with the property, and that the property was only to pass eventually if Gill really won the wager. Younger expected to have been paid, had Gill guessed wrong.

In Easter Term, 1820, ten of the judges met and considered this case. They held the conviction right, because at the time of the taking the prosecutor parted only with the possession of the money.¹

STATE v. SKILBRICK.

(Supreme Court of Washington, 1901. 25 Wash. 555, 66 Pac. 53, 87 Am. St. Rep. 784.)

Sam Skilbrick was convicted of larceny, and he appeals.

MOUNT, J.² There can be no other conclusion from the evidence in the case than that Hilger, Sampson, and the appellant, Skilbrick, were confederates, that the game was a dishonest game, that Daley had no chance of winning, that the confederates knew what Daley had in his hand, and that there was no element of chance for them in the game. Daley was entirely ignorant of the character of the game. He testified that he believed it to be an honest game of poker. When Daley placed his money on the hazard of the cards, he did not intend to part with the title, unless it was fairly won by his opponents. When Sampson, Hilger, and Skilbrick knew before the cards were dealt, or afterwards by discovery, that Daley was to lose his money through their manipulations, and when they induced him into the game, and one of them, by telling him he had the best hand, persuaded him to place his money on the table, for the purpose of obtaining his money, as they evidently did in this case, it was as much larceny as though they had induced him to lay his money on the table for them to examine, and then had taken it by some sleight of hand performance, which Daley did not understand, or by force under his protest. The object of the conspirators was to get the money. That they got possession of it through a trick or through fraud, by leading Daley to believe he would stand an equal chance of winning, when he had none, or that they got it by taking it without his consent, makes no difference. The crime would be larceny in either event. *Miller v. Commonwealth*, 78 Ky. 15, 39 Am. Rep. 194; *People v. Rae*, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372.

The cause is therefore affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, HADLEY, and WHITE, JJ. concur.

¹ Accord: *Miller v. Commonwealth*, 78 Ky. 15, 39 Am. Rep. 194 (1879); *Reg. v. Buckmaster*, 16 Cox, C. C. 339 (1887). See, also, *Crum v. State*, 148 Ind. 401, 47 N. E. 833 (1897); *Stinson v. People*, 43 Ill. 397 (1867); *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123 (1876); *Johnson v. State*, 75 Ark. 427, 88 S. W. 905 (1905).

² Only extracts from the opinion are printed.

REGINA v. WILLIAMS.

(Worcester Assizes, 1857. 7 Cox, C. C. 355.)

The prisoner was indicted for stealing one shilling, the property of John Tippin, at Evesham.

Powell for the prosecution.

On the part of the prosecution a witness was called, who deposed as follows: "I am shopman to the prosecutor. On Friday, the 10th of July, the prisoner came to the shop. He asked for half an ounce of tobacco. I served him with it. He pitched down half a crown upon the counter. I put two shillings down upon the counter, and whilst I was counting the halfpence out of the drawer, which was partly open, the prisoner picked up the two shillings off the counter, and, as I thought, threw them into the till, and asked for four sixpences instead of them. I gave him one shilling and two sixpences. I also gave him fourpence halfpenny; the tobacco coming to three halfpence. I suspected that something was wrong, but did not like to open the drawer whilst the prisoner was there; but immediately he had left the shop I counted the money in the drawer. Before the prisoner came into the shop, I had fourteen shillings and fourpence in silver in the drawer. I put the half crown which I received from the prisoner in, which would make sixteen shillings and tenpence, and, after taking out the two shillings for the prisoner, I ought to have had fourteen shillings and tenpence, but on counting my money I found that I had only thirteen shillings and tenpence. After he had thrown the two shillings into the drawer, as I thought, and as he drew his hand away, I saw his thumb bent close to the palm of his hand. I saw him put his hand into his pocket. This made me suspect that something was wrong."

Powell. The charge is made out, for the possession of the money was never parted with. It was only put down upon the counter, for the purpose of being afterwards handed over to the prisoner, and he had no right to take it up. But, even if that be not so, the prisoner ought still to be convicted, for the case comes within a class of offenses which have always been held to amount to larceny. The prisoner has obtained the money by means of a trick. *R. v. Oliver*, 4 Taunt. 274, is in point.¹

MARTIN, B. No; the decision in the case you refer to was quite right, but it does not apply. The case against the prisoner here is that he pretended that he had returned the whole of the money, when in reality he had only returned one shilling. He cannot, therefore, be convicted upon this indictment, though it might be otherwise if he had been indicted for obtaining the shilling by false pretenses.

Verdict—Not Guilty.

¹ Part of this case is omitted.

REGINA v. McGRATH.

(Court for Crown Cases Reserved, 1869. 11 Cox, C. C. 347.)

The witness, Jane Powell, said: "I had not bid for it [at auction], nor made any sign. I told the prisoner I had not bid. He said I did. I said I did not, and would not pay for it. I said this several times. I went to go out. The prisoner said I had bid for it, and must pay before I would be allowed to go out. I was then prevented going out by the man who had said I had bid for it. He stood between me and the door, and said I must pay for it. I wanted to go out, and the man prevented me. I then paid 26s. to the prisoner. I paid the money because I was afraid. The piece of cloth was then given to me, and I took it away."¹

BRETT, J. I also have had doubts whether there was sufficient evidence to support a conviction in this case. If the case had rested on the principle of the money having been obtained by a trick, I should have thought that there was not. The case, if so put, would have failed in this: That if the woman by the trick was induced to part with her money she did so willingly, and in this case with intent that it should be taken away by the prisoner. But, upon consideration, I think that this conviction may be supported on the ground that the woman parted with her money against her will, by reason of unlawful violence used and threatened by the prisoner. I had doubts whether the threat of imprisonment was sufficient; but upon consideration I think that a threat of immediate personal restraint, made by a person present and having power to carry such threat into execution, may reasonably be said to cause a person to do what this woman did against her will, and that is sufficient to make the giving up of property such a taking of property by a prisoner as to constitute the crime of larceny.

Conviction affirmed.²

REGINA v. MIDDLETON.

(Court for Crown Cases Reserved, 1873. L. R. 2 C. C. 38.)

Case stated by the Common Serjeant of London.

At the session of the Central Criminal Court held on Monday, the 23d of September, 1872, George Middleton was tried for feloniously stealing certain money to the amount of £8. 16s. 10d. of the moneys of the Postmaster General.

The ownership of the money was laid in other counts in the queen and in the mistress of the local post office.

¹ Only extracts from this case are printed.

² Accord: Reg. v. Hazell, 11 Cox, C. C. 597 (1870); Reg. v. Lovell, 8 Q. B. D. 185 (1881).

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It was proved by the evidence that the prisoner was a depositor in a post office savings bank, in which a sum of 11s. stood to his credit.

In accordance with the practice of the bank, he duly gave notice to withdraw 10s., stating in such notice the number of his depositor's book, the name of the post office, and the amount to be withdrawn.

A warrant for 10s. was duly issued to the prisoner, and a letter of advice was duly sent to the post office at Notting Hill to pay the prisoner 10s. He presented himself at that post office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for £8. 16s. 10d., and placed upon the counter a £5 note, three sovereigns, a half sovereign, and silver and copper, amounting altogether to £8. 16s. 10d. The clerk entered the amount paid, viz., £8. 16s. 10d. in the prisoner's depositor's book and stamped it, and the prisoner took up the money and went away.

The mistake was afterwards discovered, and the prisoner was brought back, and, upon being asked for his depositor's book, said he had burnt it. Other evidence of the prisoner having had the money was given.

It was objected by counsel for the prisoner that there was no larceny, because the clerk parted with the property and intended to do so, and because the prisoner did not get possession by any fraud or trick.

The jury found that the prisoner had the animus furandi at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster General when he took it up.

A verdict of guilty was recorded, and the learned Common Serjeant reserved for the opinion of the Court for Crown Cases Reserved the question whether under the circumstances above disclosed, the prisoner was properly found guilty of larceny.

November 23, 1872. The court [KELLY, C. B., MARTIN, B., and BRETT, GROVE, and QUAIN, JJ.] reserved the case for the opinion of all the judges.

BOVILL, C. J., read the judgment of COCKBURN, C. J., and BLACKBURN, MELLOR, LUSH, GROVE, DENMAN, and ARCHIBALD, JJ., as follows:¹

In the present case, the finding of the jury that the prisoner, at the moment of taking the money, had the animus furandi and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the possession of the money.

¹ Part of the opinion is omitted.

On the second question, namely, whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk (such as it was) to part with the property prevents this from being larceny, there is more difficulty, and there is, in fact, a serious difference of opinion, though the majority, as already stated, think the conviction right. The reasons which lead us to this conclusion are as follows:—At common law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery; and it is clear, from the very nature of the thing, that an intention to pass the property is essential both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean, and how this is material. Now, it is established that where a bargain between the owner of the chattel has been made with another, by which the property is transferred to the other, the property actually passes, though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber, in *Clough v. London & Northwestern Ry. Co.*, L. R. 7 Ex. 26, at pages 34, 35, where it is said: “We agree completely with what is stated by all the judges below that the property in the goods passed from the London Pianoforte Company to Adams by the contract of sale. The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. * * * We think that, so long as he has made no election, he retains the right to determine it either way, subject to this: That if, in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.”

It follows obviously from this that no conversion or dealing with the goods, before the election is determined, can amount to a stealing of the vendor's goods; for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are, accordingly, many cases, of which the most recent is *Reg. v. Prince*, L. R. 1 C. C. 150, which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretenses, and cannot be convicted of larceny. In that case, however, the money was paid to the holder of a forged check payable to bearer, and therefore vested in the holder, subject to the right of the bank to divest the property.

In the present case, the property still remains that of the Post-

master General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded. There was no gift of it to him, for there was no intention to give it to him or to any one. It was simply a handing it over by a pure mistake, and no property passed. As this was money, we cannot test the case by seeing whether an innocent purchaser could have held the property. But let us suppose that a purchaser of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in the market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not; and that on the principle enunciated by Lord Abinger, in *Chandler v. Hopkins*, 4 M. & W., at page 404, when he says: "If a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that it is not a warranty. There is no warranty that he should sell him peas. The contract is to sell peas, and if he sends him anything else in their stead it is a nonperformance of it."

We admit that the case is undistinguishable from the one, supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but, after carefully weighing the opinions to the contrary, we are decidedly of the opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this: Whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*.

But it is further urged that if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being that of larceny, though the intention was inoperative, and no property passed. In almost all the cases on the subject, the property had actually passed, or at least the court thought it had passed; but the two cases, *Rex v. Adams*, 2 Russell on Crimes (4th Ed.) 200, and *Rex v. Atkinson*, 2 East, P. C. 673, appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principles the cases can be supported if *Rex v. Davenport*, 2 Russell on Crimes (4th Ed.) 201, and the others involving the same principle, are law; and though, if a long series of cases had so decided, we should think we were bound by them, yet we think that in a court such as this, which is in effect a court of error, we ought not to feel bound by two cases

which, as far as we can perceive, stand alone, and seem to us contrary both to principle and justice.²

CLEASBY, B.³ The cases establish that, where there is a complete dealing or transaction between the parties for the purpose of passing the property, and so the possession parted with, there is no taking, and the case is out of the category of larceny.

Considering what the penalty was, there was nothing unreasonable or contrary to the spirit of our laws in drawing a dividing line, and holding that, whenever the owner of property is a party to such a transaction as I have mentioned, such serious consequences were not to depend upon the conclusion which might be arrived at as to the precise terms of the transaction, which might be complicated and uncertain, and difficult to ascertain. And this agrees with Hawkins' opinion (*Pleas of the Crown*, book I, c. 33, § 3), where (in dealing with the question of what shall be a felonious taking), after pointing out that, unless there has been a trespass in taking goods, there can be no felony in carrying them away, he adds: "And herein our law differs from the civil, which, having no capital punishment for bare thefts, deals with offenses of this kind (that is, fraudulent appropriation of things not taken) as in strict justice most certainly it may; but our law, which punishes all theft with death if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chooses to deal with them as civil, than criminal, offenses."

I believe the rule is as I have stated, and that it is not limited to cases in which the property in the chattel actually passes by virtue of the transaction. I have not seen that limitation put upon it in any text-book on the Criminal Law; and there are, unless I am mistaken, many authorities against it. The cases show, no doubt, beyond question, that where the transaction is of such a nature that the property in the chattel actually passes (though subject to be resumed by reason of fraud or trick), there is no taking, and therefore no larceny. But they do not show the converse, viz., that when the property does not pass there is larceny. On the contrary, they appear to me to show that where there is an intention to part with the property along with the possession, though the fraud is of such

² Bovill, C. J., and Keating, J., held the prisoner guilty of larceny on the ground that the property in the money was in the crown or the Postmaster General; that neither the postmasters nor clerks had any power or authority to part with either the property or possession of the moneys so deposited, or any part of them, to any person, except upon the special authority of the Postmaster General; that therefore in this case neither the clerk nor postmistress had any authority to part with the moneys which the clerk placed upon the counter; and hence the case came within the principle of *Reg. v. Stewart*, *supra*.

Kelly, C. B., delivered a concurring opinion, and Pigott, B., concurred in an opinion, on the ground that the mistaken act of the clerk in placing the money on the counter did not invest the prisoner with possession, and that his act of taking it up was trespassory.

³ A Part of this opinion is omitted.

a nature as to prevent that intention from operating, there is still no larceny. This seems so clearly to follow, from the cardinal rule that there must be a taking against the will of the owner, that the cases rather assume that the intention to transfer the property governs the case than expressly decide it. For how can there be a taking against the will of the owner, where the owner hands over the possession, intending by doing so to part with the entire property.

As far as my own experience goes, many of the cases of fraudulent pretenses which I have tried have been cases in which the prisoner has obtained goods from a tradesman upon the false pretense that he came with the order from a customer. In these cases no property passes either to the customer or to the prisoner, and I never heard such a case put forward as a case of larceny. And the authorities are distinct, upon cases reserved for the judges, that in such cases there is no larceny.

In my opinion all the authorities warrant the proposition of law as laid down by my Brother BLACKBURN in the last reported case on the subject, *Reg. v. Prince*, L. R. 1 C. C. 150 (which was, like the present, a case of payment under a mistake of fact): "If the owner intended the property to pass, though he would not have so intended had he known the real facts, that is sufficient to prevent the offense of obtaining another's property from amounting to larceny; and where a servant has an authority coequal with the master's, and parts with his master's property, such property cannot be said to have been stolen, inasmuch as the servant intends to part with the property in it."

With those authorities before me I cannot accept as the proper test, not the intention of the owner to deliver over the property (which is a question of fact), but the effect of the transaction in passing the property, which might raise in many cases a question of law. This appears to me to be a novelty at variance with the definition of larceny, which makes the mind and intent of the owner the test, and irreconcilable with the manner in which these cases have always been dealt with.

In the present case the transaction was with the clerk of the postmistress. The clerk was the person placed in the office for the purpose (*inter alia*) of making payments and taking receipts. He is called the clerk, and therefore his act, within the general scope of his authority, would be the act of the postmistress. But it is suggested that the postmistress was not in any sense the agent of the Postmaster General, but had in each case a separate and particular authority to make the payment. And upon looking into the act of Parliament (St. 24 & 25 Vict. c. 14) I should not be prepared to decide this case upon the ground that the postmistress had a general authority, or more than a particular one, to make the payment of 10s. to the prisoner. And if, at the time when the payment was made, the postmistress or clerk had done some act wholly out of the authority, as, for instance, payment to a stranger, I should feel a diffi-

culty in saying it must be regarded as the act of a person capable of passing the property in such a transaction. But upon this it is not necessary to give a decided opinion, because the prisoner was the person entitled to be paid the 10s. for which he applied under the order, and the authority was to pay to him that sum. The exercise of power in making too large a payment on behalf of the Postmaster General was, therefore, only excessive, and (according to the ordinary rule in the exercise of power) was valid, so far as it was within the power; the excess being clearly separable.

This is not the case of the postmistress being authorized to deliver one bag of money to one person and another bag of money to another person. In that case the prisoner, knowingly getting the wrong bag, would get something to which he had no color of title. The authority here is to enter into an account with the prisoner, by paying him a certain amount and making a corresponding alteration in the balance. And this is done; the payment is made, and the corresponding alteration in the balance; but there is a mistake in the amount paid, and so in the balance, and it becomes really the ordinary case of payment by a banker's clerk by mistake. It appears to me quite impossible, with due attention to the facts, to regard the prisoner as a stranger intervening in a transaction between other parties. No other party was present or was named, and the prisoner entered and left the office in the same character, viz., that of payee, though he left it as payee of a larger amount than he was entitled to, and carried with him the book, which was an unanswerable proof that he was payee, and was payee of the larger amount.

The prisoner was, therefore, entitled to be paid the 10s. out of the money handed to him, and, that being so, there is a technical objection to the conviction—that there are no particular chattels or pieces of money in respect of which the charge of larceny can be sustained.

But, independent of this technical objection, the duty of the prisoner, if he had acted as he ought to have done, was to have taken 10s. out of the amount, and to have handed the rest to the clerk. He ought, at the same time, to have handed back his book and had it corrected, because it charged him with the receipt of £8 odd; but his omission to do this does not, in my opinion, involve him in the charge of larceny.

There was no mistake in the person, because the prisoner handed in his order and also his deposit book; and if the clerk had known him well it would have made no difference. He would still have paid him the wrong amount, because the same cause would have operated—looking at the wrong order.

There was no mistake in the amount. I mean it was not the case of the clerk handing him a £100 note when he intended to hand a £5 note, or, unknowingly, two notes, instead of one. He intended to pay the prisoner the particular sum; and it was a deliberate act, because he took the amount from a document, and completed the trans-

action by debiting the prisoner with that sum in his book. So that it was not like the case of a wrong sum being put down by mistake, and the prisoner snatching it up and running away with it, for the purpose of preventing the mistake from being set right.

The mistake was in the supposed amount of the prisoner's claim. The prisoner applied for 10s., and the clerk thought he was entitled to more, and paid him accordingly, and his overpayment might have been afterwards adopted by the postmaster, so as to make the prisoner chargeable with the balance. The clerk did not the less intend to make the payment which he deliberately made because he was at the time under the influence of a mistake. He would not have intended to make the payment, but for the mistake. Mistakes are constantly occurring, and few people can say that they have not acted under their influence; but their acts remain as acts done at the time, though their effects may be afterwards corrected. No doubt there was no intention to overpay the prisoner—that is, to produce the effect of overpayment; but the intention was to do the act of paying the larger sum, because it was thought to be the proper one.

This is the answer to one argument addressed to us, viz., that the prisoner took up what was intended for another, and not for him, and therefore there was a taking *invito domino*. The conclusion of law would be quite correct, if it could be correctly said that the amount was intended for another. The clerk ought to have intended that amount for another, and would have done so if he had properly informed himself of the facts; but, unfortunately for the prisoner, the clerk did not properly inform himself of the facts, and therefore he intended the prisoner to receive the larger amount. The clerk intended A. to receive what he ought to have intended B. to receive; but it was not the less his intention that A. should receive what he handed over to him. There was only one transaction, and only two parties to it, the clerk and the prisoner, and his fault was the work of an instant, and might, to an ignorant and illiterate person, be connected with some confusion of mind, though the disparity of amount in this case would make a person of any sense at once see and correct the mistake.

I do not think a man ought to be exposed to a charge of felony upon a transaction of this description, which is altogether founded upon an unexpected blunder of the clerk. The prisoner was undoubtedly at the office for an honest purpose, and finds a larger sum of money than he demanded paid over to him and charged against him. A man may order and pay for certain goods, and, by mistake, a larger quantity than was paid for may be put in the package, and he may take them away; or he may pay in excess for that which is ordered and delivered. Is the person receiving to be put in the peril of a conviction for felony in all such cases, upon the conclusion which may be arrived at as to whether he knew, or had the means of knowing, and had the *animus furandi*? I think not. I think that such cases

are out of the area of felony, and, therefore, the animus furandi is inapplicable, and ought not to be left to the jury. And any conclusion, founded upon the finding of the jury upon a question which ought not to be left to them, must be erroneous, because the foundation is naught. I think the conviction was against law and ought to be quashed.⁴

SECTION 5.—THE ANIMUS FURANDI.

THE FISHERMAN'S CASE.

(York Assizes, 1583. 2 East, P. C. 661.)

A traveler met a fisherman with fish, who refused to sell him any, and he by force, and putting in fear, took away some of his fish, and threw him money much above the value of it; and judgment was respited, because of the doubt whether the intent were felonious on account of the money given.⁵

ANONYMOUS.

(Old Bailey, 1698. 2 East, P. C. 662.)

At the Old Bailey, 1698, before Holt, C. J., and other judges, it was found that A. assaulted B. on the highway with a felonious intent, and searched the pockets of B. for money, but finding none, A. pulled off the bridle of B.'s horse, and threw that and some bread, which B. had in pannels, about the highway, but did not take anything from B. And resolved, upon conference with all the judges, that this was no robbery, because nothing was taken from B.⁶

REX v. PHILLIPS.

(Gloucester Assizes, 1801. 2 East, P. C. 662.)

Phillips and Strong were indicted for stealing a mare and gelding of John Goulter. It appeared in evidence that the prisoners had gone to the stables of Goulter, who kept an inn at a place called

⁴ Martin and Bramwell, B. B., and Brett, J., delivered concurring opinions.

⁵ Compare *Mason v. State*, 32 Ark. 238 (1877); *Beckham v. State* (Tex. Cr. App.) 22 S. W. 411 (1893); *Kirk v. Garrett*, 84 Md. 383, 35 Ail. 1089 (1896).

⁶ "The better reason seems to be that the particular goods were not taken with a felonious intent; for surely there was a sufficient taking and separation of the goods from the person." 2 East, P. C. 662. Accord: *Jordan v. Commonwealth*, 25 Grat. (Va.) 943 (1874).

Petty France, in the night of the 26th of February last, opened them, and taken out the horse and mare, the subject of the indictment, and rode on them to Lechlade, about 32 or 33 miles off, where they carried them to different inns, and left them in care of the hostlers, directing them to clean and feed them, and saying that they should return in three hours. In the course of the same day the prisoners were taken at a distance of 14 miles from Lechlade, walking toward Farringdon, in Berkshire, in a direction from Lechlade. The jury, being directed to consider whether the prisoners, when they took the horse and mare, intended to make any further use of them than to ride them, for the purpose of assisting them in their journey towards the place where they were going, and then to leave them, to be recovered by the owner or not, as it might turn out, and whether they intended to return to Lechlade and make any further use of them, found the prisoners guilty, but added they were of opinion that the prisoners meant merely to ride them to Lechlade and to leave them there, and that they had no intention to return for them, or to make any further use of them. Upon this finding, at a conference first in Easter, and afterwards in Trinity Term, 1801, the judges (dissentiente GROSE, J., et dubitante Lord ALVANLY) held it to be only a trespass, and no felony, for there was no intention in the prisoners to change the property or make it their own, but only to use it for a special purpose—i. e., to save their labor in traveling. The judge who dissented thought the case differed from those first above mentioned, because here there was no intention to return the horses to the owner, but, for aught the prisoners concerned themselves, to deprive him of them. But the rest agreed that it was a question for the jury, and that, if they had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned.

REX v. CABBAGE.

(Court for Crown Cases Reserved, 1815. Russ. & R. 292.)

The prisoner was tried before THOMSON, C. B., at the Lent Assizes for the county of Lancaster, in the year 1815, on an indictment for feloniously stealing, taking, and leading away a gelding, the property of John Camplin.¹

It appeared that the gelding in question was missed by the prosecutor from his stables on Monday, the 28th of February, 1815. The stable door, it appeared, had been forced open. The prosecutor went the same day to a coal pit, about a mile from the stable, where he saw the marks of a horse's feet. This pit had been worked out and had a fence round it, to prevent persons from falling in. One of the

¹ The second count is omitted.

rails of this fence had been recently knocked off. A man was sent down into the pit, and he brought up a halter, which was proved to be the halter belonging to the gelding. In about three weeks after the finding of the halter, the gelding was drawn up from the coal pit in the presence of the prosecutor, and who knew it to be his. The horse's forehead was very much bruised, and a bone struck out of it. It appeared that, at the time this gelding was destroyed, a person of the name of Howarth was in custody for having stolen it in August, 1813, and that the prosecutor, Camplin, had recovered his gelding again about five weeks after it was taken. Howarth was about to take his trial for this offense when the gelding was destroyed in the manner stated. The prisoner, Cabbage, was taken into custody on the 27th of March, 1815; and on his apprehension he said that he went in company with Ann Howarth (the wife of Howarth, who was tried for stealing the said gelding) to Camplin's stable door, and that they together forced open the door and brought the horse out. They then went along the road, till they came to the coal pit before mentioned, and there they backed the horse into the pit.

It was objected by the prisoner's counsel that the evidence in this case did not prove a larceny committed of the horse; that the taking appeared not to have been done with intention to convert it to the use of the taker, "*animo furandi et lucri causa*."

THOMSON, C. B., overruled the objection, and the prisoner was convicted upon the first count of the indictment for stealing the horse. Judgment was passed on him, but the learned Chief Baron respited the execution to take the opinion of the judges as to the propriety of the conviction.

In Easter Term, 1815, the judges met to consider this case, and the majority of the judges held the conviction right. Six of the learned judges, viz., RICHARDS, B., BAYLEY, J., CHAMBER, J., THOMSON, C. B., GIBBS, C. J., and Lord ELLENBOROUGH, held it not essential to constitute the offense of larceny that the taking should be *lucri causa*. They thought a taking fraudulently, with an intent wholly to deprive the owner of the property, sufficient; but some of the six learned judges thought that in this case the object of protecting Howarth by the destruction of this animal might be deemed a benefit or *lucri causa*. DALLAS, J., WOOD, B., GRAHAM, B., LE BLANC, J., and HEATH, J., thought the conviction wrong.²

² Accord: *State v. Brown*, 3 Strob. (S. C.) 508 (1849); *People v. Juarez*, 28 Cal. 350 (1865); *Stegall v. State*, 32 Tex. Cr. R. 100, 22 S. W. 146, 40 Am. St. Rep. 761 (1893); *Mitchell v. Territory*, 7 Okl. 527, 54 Pac. 782 (1898); *State v. McKee*, 17 Utah, 370, 53 Utah, 733 (1898). Contra: *People v. Woodward*, 31 Hun (N. Y.) 57 (1883); *Pence v. State*, 110 Ind. 95, 10 N. E. 919 (1886).

REX v. WRIGHT.

(Old Bailey, 1828. 9 Car. & P. 554, note.)

On an indictment for larceny by a servant in stealing his master's plate, it appeared that, after the plate in question was missed, but before complaint made to the magistrate, the prisoner replaced it; and it was proved by a pawnbroker that the plate had been pawned by the prisoner, who had redeemed it; and the pawnbroker also stated that the prisoner had, on previous occasions, pawned plate and afterwards redeemed it.

HULLOCK, B. (HOLROYD, J., being present), left it to the jury to say whether the prisoner took the plate with the intent to steal it, or whether he merely took it to raise money on it for a time, and then return it; for that in the latter case it was no larceny. The jury acquitted the prisoner.¹

REX v. WEBB.

(Court for Crown Cases Reserved, 1835. 1 Moody, C. C. 431.)

The prisoners were tried before Mr. Justice PATTESON, at the Spring Assizes for Cornwall, 1835, and found guilty.

The indictment charged them with stealing 100 pounds weight of copper ore, the property of Stephen Davey and others. It appeared in evidence that Stephen Davey and others were the adventurers in a mine called the Consolidated Mine.

The prisoners and two others were tributers in their mine, but not adventurers. The prosecutors of the indictment were Cornish, and three others, who were also tributers in the mine, but not adventurers. It appeared that tributers (generally in companies of four) take from the adventurers a certain number of yards in the mine, called a pitch, from which they dig out ore, and throw into a heap or pile in some level, whence they convey it along the level to a shaft, and so up to the surface. There it is taken by the adventurers, and the tributers do not interfere further.

The tributers are paid according to their agreement, so much in the pound on the selling price of the ore. Where it is very good, they receive a smaller sum than where it is inferior, because the quantity of labor (which is what they contribute) produces a more valuable

¹ In Reg. v. Phetheon, 9 Car. & P. 552 (1840), Gurney, B., said: "I think that if this doctrine of an intention to redeem property is to prevail, courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover."

In Reg. v. Trebilcock, 7 Cox, C. C. 408 (1858), on similar facts, the jury found the prisoner guilty, but recommended him to mercy, believing that he intended ultimately to return the property. Held, on a case reserved, that the verdict of guilty was consistent with the ground of their recommendation. See, also, Fields v. State, 6 Cold. (Tenn.) 524 (1869).

commodity in the one case than the other. The prosecutors' pitch contained better ore than the prisoners'. The prosecutors received 2s. 4d. in the pound from the adventurers; the prisoners, 5s. 6d.

It was proved satisfactorily that the prisoners had taken a large quantity of ore from the prosecutors' pile and added it to their own.

Halcomb, for the prisoners, contended, secondly,¹ that by taking ore out of one pile and putting it in another the prisoners did not steal from the adventurers, for both piles remain in possession of the adventurers, if the tributers be but servants; and if the tributers be tenants in common, still, as both piles were intended to come, and ultimately would come, into the hands of the adventurers, there could be no stealing from them.

Rogers, for the prosecutors, answered that the adventurers were cheated, for they would have to pay 5s. 6d. in the pound on the ore removed to the prisoners' pile, whereas, if it had remained in the prosecutors' pile, they would pay only 2s. 4d. in the pound, and, besides that, the unauthorized removal of the ore from the prosecutors' pile by the prisoners, with a fraudulent intention to appropriate it to their own benefit, constituted a larceny the moment it was removed, which could not be cured by returning it any way to the adventurers.

The learned judge was of opinion that the property was correctly laid, and a larceny proved, but reserved the latter point, and requested the opinion of the judges on both points.

In Easter Term, 1835, this case was considered by Lord DENMAN, C. J., TINDAL, C. J., PARK, J., LITLEDALE, J., GASELEE, J., BOSANQUET, J., ALDERSON, B., WILLIAMS, J., PATTESON, J., and they held the conviction wrong; PATTESON, J., dissentiente.²

REGINA v. RICHARDS.

(Monmouth Assizes, 1844. 1 Car. & K. 532.)

Larceny. The prisoner was indicted for stealing iron, the property of William Williams and others, his masters.

The iron alleged to have been stolen was an iron axle of a tram wagon, and it was proved that the prisoner was employed as a puddler by the prosecutors, who were partners in an iron company, and that the puddlers employed by the company were in the habit of receiving a certain quantity of pig iron, which they were to put into the furnaces, and they were paid for their work according to the weight of the iron drawn out of the furnace and formed into puddle bars. The prisoner was detected by the foreman of the works in putting an iron axle, be-

¹ Part of the case, dealing with another question, is omitted.

² The conviction was held wrong on the second point.

Accord: Reg. v. Holloway, 3 Cox, C. C. 241 (1849); Reg. v. Poole, Dears. & B. 345 (1857). Cf. Rex v. Manning, Dears. 21 (1852).

longing to the company (which was not pig iron), into the furnace with the pig iron. The foreman stated that the value of the axle to the company was about 7s., and he had calculated that the gain to the prisoner by putting it in the furnace and melting it would be, according to the mode adopted for paying for the work, a fraction more than a penny.

TINDAL, C. J. I doubt whether the act of the prisoner, though unquestionably fraudulent and wrongful, comes within the definition of a larceny, as the iron was to come back to the owners in the same substance, though in another form.

G. K. Rickards, for the prosecution. In the case of *Rex v. Morfitt*, R. & R. C. C. 307, it was held that a servant's clandestinely taking his master's corn to give to his master's horse is felony; and in the case of *Rex v. Cabbage*, R. & R. C. C. 292, where the prisoner forced open a stable door, and took out a horse and led it to an old coal pit, and there backed it down and killed it, the object being that the horse might not contribute to furnish evidence against another person, named Howarth, who was under the charge of stealing it, the judges held that this was larceny, although the prisoner had no intention of deriving any pecuniary benefit from taking the horse.

TINDAL, C. J. I shall leave it to the jury to say whether the prisoner put the axle into the furnace with a felonious intent, to convert it to a purpose for his own profit; for, if he did so, this was larceny.

His lordship left this question to the jury.

Verdict—Guilty.

REGINA v. PRIVETT.

(Court for Crown Cases Reserved, 1846. 1 Den. C. C. 193.)

The prisoners were tried before Mr. Justice ERLE, at the Spring Assizes, for the county of Hants.

It was proved that the prisoners took from the floor of a barn, in the presence of the thrasher, five sacks of unwinnowed oats, and secreted them in a loft there, for the purpose of giving them to their master's horses; they being employed as carter and carter's boy, but not being answerable at all for the condition or appearance of the horses.

The jury found that they took the oats with intent to give them to their master's horses, and without any intent of applying them for their private benefit.

The learned judge reserved the case for the opinion of the judges on the point whether the prisoners were guilty of larceny *R. v. Morfitt* and *Another*, Russ. & R. 307; *R. v. Cabbage*, Russ. & R. 292.

Lord DENMAN, C. J., TINDAL, C. J., PARKE, B., PATTESON, J., WILLIAMS, J., COLTMAN, J., ROLFE, B., WIGHTMAN, J., CRESSWELL, J., ERLE, J., and PLATT, B., met to consider this case.

The greater part of the judges present (exclusive of ERLE, J., and PLATT, B.) appeared to think that this was larceny, because the prisoners took the oats knowingly against the will of the owner, and without color of title or of authority, with intent, not to take temporary possession merely, and then abandon it (which would not be larceny), but to take the entire dominion over them, and that it made no difference that the taking was not *lucri causa*, or that the object of the prisoners was to apply the things stolen in a way which was against the wish of the owner, but might be beneficial to him. But all agreed that they were bound by the previous decisions to hold this to be larceny, though several of them expressed a doubt if they should have so decided, if the matter were *res integra*.¹

ERLE, J., and PLATT, B., were of a different opinion. They thought that the former decision proceeded in the opinion of some of the judges on the supposition that the prisoners would gain by the taking, which was negatived in this case; and they were of opinion that the taking was not felonious, because to constitute larceny it was essential that the prisoner should intend to deprive the owner of the property in the goods, which he could not if he meant to apply it to his use.

¹ Accord: *Reg. v. Osborne*, 5 Jur. 200 (1841); *Reg. v. Coreswell*, 5 Jur. 251 (1841). Contra: *Reg. v. Cole*, 5 Jur. 200, note (1839).

"The jury were of opinion that O'Donnell had got some person to take away the mare in order to extort from Peebles money, which he knew he had no claim to, for a return of the mare, and that O'Donnell had the mare returned, knowing that the money had been deposited with and would be paid to him by Sweeney; and it was, in fact, paid for the return of the mare, though nominally in relation to the farm, and accordingly found the prisoner, O'Donnell, guilty. At the instance of Mr. Dowse, counsel for the prisoner, O'Donnell, I respited sentence, and discharged him on entering into recognizance, with two sureties, to appear at the next assizes to receive sentence. We are all of opinion that the conviction was right, and that the jury were right in their finding on the questions submitted to them. It is true there may not have been a larceny committed, but we think there was evidence to justify the jury in such a finding." Monahan, C. J., in *Regina v. O'Donnell*, 7 Cox, C. C. 337 (1857).

See, also, *Reg. v. Peters*, 1 Car. & K. 245 (1843); *Commonwealth v. Mason*, 105 Mass. 163, 7 Am. Rep. 507 (1870); *Dunn v. State*, 34 Tex. Cr. R. 257, 30 S. W. 227, 53 Am. St. Rep. 714 (1895).

"Another point that seems to be relied on by counsel for the prisoners is that one of them supposed the wheel belonged to a person who owed him for labor. Such a supposition, even if it were true, was neither a justification nor an excuse. The law does not permit a creditor to make collection of what is due him by a larceny of his creditor's goods." Lake, C. J., in *Gettinger v. State*, 13 Neb. 312, 14 N. W. 403 (1882). Accord. *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492 (1857). But see *Young v. State*, 37 Tex. Cr. R. 457, 36 S. W. 272 (1896).

REGINA v. GODFREY.

(Worcester Assizes, 1838. 8 Car. & P. 563.)

Larceny. The indictment charged the prisoner with having stolen six sheets of paper, of the value of threepence, and a paper parcel containing two letters, of the value of threepence, of the goods and chattels of William Brinton.

It was opened by W. J. Alexander, for the prosecution, that Mr. Brinton was a solicitor at Kidderminster, and that the prisoner, Mr. Godfrey, was an innkeeper and stagecoach proprietor at that place, and that on Saturday, the 29th of July, 1837, Mr. Brinton being at Brierley Hill, engaged in the South Staffordshire election, he had occasion to send two letters to Kidderminster; these letters being inclosed in a parcel addressed, "Mrs. W. Brinton, Kidderminster. Immediate." The parcel was sent by a coach of which the prisoner was the proprietor. However, on Mr. Brinton's arriving at home on the next day, he discovered that the parcel had not arrived; and on a note being sent to Mr. Godfrey respecting it he returned a written answer, stating that no parcel had arrived directed to W. Brinton, Esq., and in answer to another note he replied that no parcel had arrived for Mr. Brinton. It would, however, be proved that the parcel did arrive, and that Mr. Godfrey himself received and opened it, and, finding it to contain letters, he broke the seals and read them, and then disposed of them in such manner as he thought proper.

LORD ABINGER, C. B. The facts you have opened are rather a trespass than a felony. Opening a letter from idle curiosity would not be felony.

W. J. Alexander. I should submit that, where the act was done with intent to injure another, that would be sufficient.

LORD ABINGER, C. B. The term "*lucri causa*" infers that it should be to gain some advantage to the party committing the offense. A malicious injury to the property of another is not enough.

W. J. Alexander. In Cabbage's Case it was held that a taking with intent to destroy is a stealing, if it be done to effect an object of supposed advantage to the party committing the offense, or to a third person. There a person took a horse, and backed it into a coal pit and killed it, his object being that the horse might not contribute to furnish evidence against another person, who was charged with stealing it; and that was held to be larceny, six judges against five holding it not to be essential that the taking should be *lucri causa*, but thinking that a taking fraudulenter, with intent wholly to deprive the owner of the property, was sufficient.

LORD ABINGER, C. B. I cannot accede to that. If a person, from idle, impertinent curiosity, either personal or political, opens another person's letter, that it is not felony. Mr. Alexander has opened an action for not safely delivering a parcel, in which a jury might give

considerable damages. I cannot see any excuse for the conduct of the defendant, if it was as stated. Still, assuming that statement to be correct, it is no felony. It was evidently done to gratify some idle curiosity, or, perhaps, to prevent the letters from arriving. It is a trespass and a breach of contract, but no felony.

His Lordship directed an acquittal.

Verdict—Not guilty.

REGINA v. JONES.

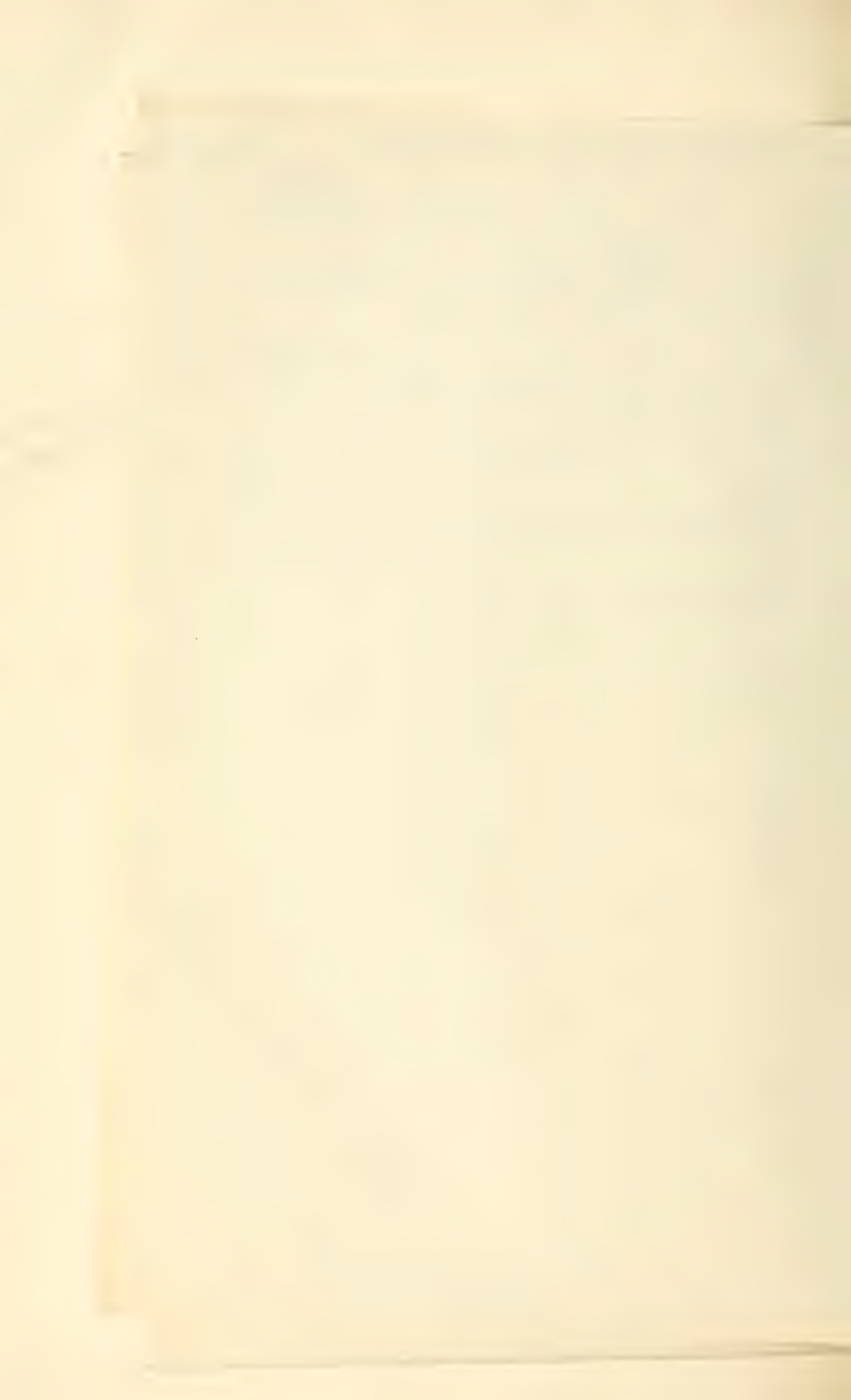
(Court for Crown Cases Reserved, 1846. 2 Car. & K. 236.)

The prisoner, Elizabeth Jones, pleaded guilty to an indictment, under St. 1 Vict. c. 36, § 28, for stealing at Ross, from an officer of the post office, a post letter, the property of the Postmaster General.¹ The prisoner had been cook in the employ of a Mrs. Garbett, of Upton Bishop, whose service she was about to leave, having herself given notice to do so, and was in treaty with a Mrs. Dangerfield, of Cheltenham, for a similar situation. Mrs. Dangerfield had consented to employ her if a satisfactory answer from Mrs. Garbett should be returned to a letter to be written for the purpose of making inquiries respecting her character. This letter, the subject of the present indictment, was written by Mrs. Dangerfield, directed to Mrs. Garbett, and posted at Cheltenham, and was from thence duly forwarded to the post office at Ross. Mrs. Garbett, having found fault with the prisoner for allowing the friend of another servant to breakfast in the kitchen without her leave, discharged her from her service, and told her that a character would not be given to her. The day after her dismissal she went to the post office at Ross, and there applied to the clerk on duty for a letter from Cheltenham addressed to Mrs. Garbett, stating that she was a servant in Mrs. Garbett's employ, and that Mrs. Garbett expected a letter from Cheltenham that morning, which she was to take; but, upon being informed that the one letter by itself could not be given, the prisoner took from the officer all the letters for Mr. and Mrs. Garbett, including that written by Mrs. Dangerfield, the subject of the present indictment, which she burnt, but delivered the others to the person who was in the habit of conveying the letters from the Ross post office to the inhabitants of Upton Bishop, and they reached Mr. and Mrs. Garbett in safety.

The question for the opinion of the judges is whether the taking and destroying of the letter, under these circumstances, amounted to larceny.

Before Lord DENMAN, C. J., TINDAL, C. J., POLLOCK, C. B., PARKE, B., PATTESON, J., WILLIAMS, J., COLTMAN, J., ROLFE, B., CRESSWELL, J., ERLE, J., and PLATT, B.

¹ Part of this case is omitted.



The case was afterwards considered by the judges, who were of opinion that the offense of the prisoner was a larceny and their Lordships held the conviction right.²

REGINA v. BAILEY.

(Court for Crown Cases Reserved, 1872. L. R. 1 C. C. 347.)

Case stated by LUSH, J.:

The prisoner was indicted at Oxford at the Summer Assizes, 1871, under the thirtieth section of the larceny act (St. 24 & 25 Vict. c. 96).

The first count of the indictment charged the prisoner with stealing certain process of a court of record, to wit, a certain warrant of execution issued out of the county court of Berkshire, in an action wherein one Arthur was plaintiff, and the prisoner defendant; also another warrant of execution out of the same court in an action of Halcombe & Co. against the prisoner.

The second count stated that, at the time of committing the offense hereinafter mentioned, one Brooker had the lawful custody of certain process of a court of record, to wit, a warrant of execution out of the county court of Berkshire in an action between Arthur and the defendant; that defendant, intending to prevent the due course of law, and to deprive Arthur of the rights, benefits, and advantages from the lawful execution of the warrant, did take from Brooker the said warrant, he (Brooker) having then the legal custody of it.

It was proved that two actions had been brought in the county court against the prisoner, in each of which judgment had been given against him, and a warrant of execution issued against his goods. The high bailiff of the court made the levy under these warrants, and, having done so, he handed the warrants over to his deputy bailiff, and left him in possession of the goods.

The prisoner, a day or two afterwards, forcibly took the warrants out of the bailiff's hands and kept them. He then ordered him away as having no authority to remain there any longer, and on his refusal to go forcibly turned him out.

The prisoner was convicted; but as the learned judge entertained a doubt whether these facts supported the count for larceny, and whether, as the prisoner's intention in taking the warrants was not to make use of them, but merely to deprive the bailiff, as he supposed, of his authority, and as the validity of the execution was not affected by his taking the warrants, he was guilty of taking them for a fraudulent purpose within the meaning of the statute, he forebore to pass sentence, and admitted the prisoner to bail till the opinion of this court should have been taken upon the above points.

No counsel appeared.

² See, also, *Reg. v. White*, 9 Car. & P. 344 (1840); *State v. Wellman*, 34 Minn. 221, 25 N. W. 395 (1885); *Reg. v. Wynn*, 1 Den. C. C. 365 (1848).

COCKBURN, C. J. I think the first count, charging larceny, will not hold. It is clear that the prisoner took the warrants from the bailiff, thinking that his authority depended on his possession of the warrants, and that by taking them away he would put an end to the authority. But this was not done *animo furandi*. It was not done *lucri causa*. It was no more stealing than it would be to take a stick out of a man's hand to beat him with it.

Under the second count, the question is whether what was done was done with a fraudulent purpose. I think it was so. The purpose was to deprive the officer of the power to execute process, and so to defeat the execution.

MARTIN and CHANNELL, BB., and KEATING, J., concurred.

LUSH, J. I quite concur, on consideration, in the judgment of the court. I thought at first that what the statute meant was an intention to use the documents for a fraudulent purpose.

Conviction affirmed.

SECTION 6.—AGGRAVATED LARCENY.

I. GRAND LARCENY.

Although that by some opinions the value of twelvepence make grand larceny (22 Assiz. 39, per Thorp), yet the law is settled that it must exceed twelvepence to make grand larceny (West. 1, c. 15; 8 E. 2, Coron. 404). * * *

If two or more be indicted of stealing goods above the value of twelvepence, though in law the felonies are several, yet it is grand larceny in both. 8 E. 2, Coron. 404. But if upon the evidence it appears that A. stole twelvepence at one time, and B. twelvepence at another time, so that the acts themselves were several at several times, though they were the goods of the same person, this is petit larceny in each, and not grand larceny in either.

If A. be indicted of larceny of goods to the value of five shillings, yet the petit jury may upon the trial find it to be but of the value of twelvepence, or under, and so petit larceny. 41 E. 3, Coron. 451; 18 Assiz. 14 Stamf. P. C. p. 24b.

If A. steal goods of B. to the value of sixpence, and at another time to the value of eightpence, so that all put together exceed the value of twelvepence, though none apart amount to twelvepence, yet this is held grand larceny, if he be indicted of them altogether. Stamf. P. C. p. 24, collected from the books of 8 E. 2, Coron. 415; Dalt. p. 259, c. 101.

But if the goods be stolen at several times from several persons, and each apart under value, as from A. fourpence, from B. sixpence,

from C. tenpence, these are several petit larcenies, and though contained in the same indictment make not grand larceny. But it seems to me that if at the same time he steals goods of A. of the value of sixpence, goods of B. of the value of sixpence, and goods of C. to the value of sixpence, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, because it was one entire felony done at the same time, though the persons had several properties, and therefore, if in one indictment, they make grand larceny.

1 Hale, P. C. 530.

In these prosecutions the valuation ought to be reasonable; for when St. Westm. II, c. 25, was made, silver was but 20d. an ounce, and at the time Lord COKE wrote it was worth 5s., and it is now higher.¹

At common law the judgment for grand larceny is of death; but the party may pray the benefit of his clergy, * * * and he shall also lose his goods.

2 East, P. C. 736.

REX v. JONES.

(Berkshire Assizes, 1830. 4 Car. & P. 217.)

The prisoner was charged with stealing in a dwelling house 68 yards of lace of the value of £13, the property of George Shepherd.

It appeared that the prisoner, on the 18th of October, 1829, sent the lace (which was in several distinct pieces), from Abingdon to London in a parcel by the coach; and it was also proved that he was the shopman of Mr. Shepherd, and that no one piece of lace was worth £5.

Talfour, for the prisoner, suggested that, in *favorem vitæ*, the learned Baron would take it that the pieces of lace might have been stolen at different times.

¹ "As a general rule the market value of goods stolen, or that for which similar goods are, at the time and place of the theft, commonly in the markets bought and sold, is the standard of value. But when things stolen have no marketable value—for instance, a secondhand coffin, *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785; or secondhand clothing, *Pratt v. State*, 35 Ohio St. 514, 35 Am. Rep. 617; *Printz v. People*, 42 Mich. 144, 3 N. W. 306, 36 Am. Rep. 437; or brood sows, *State v. Walker*, 119 Mo. 467, 24 S. W. 1011—the owner may testify to the actual value of the property regardless of any market value for it." *Burgess, J.*, in *State v. Maggard*, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 484 (1901). In *State v. Hathaway*, 100 Iowa, 225, 69 N. W. 449 (1896), where the articles stolen consisted of wearing apparel that had been used, it was held that in determining the market value of the articles the jury was not confined to the price at which dealers in secondhand clothing would buy or sell them, but that the testimony of the owner as to their "reasonable market value" was competent. In *State v. Brown*, 55 Kan. 611, 40 Pac. 1001 (1895), it was adjudged that, "as the thief is stealing the property from the time he takes it up until he lays it down," he has no cause to complain if the value is estimated by the market value at the place to which it was taken by him and sold.

BOLLAND, B. I cannot assume that to have been so. We find that the lace is all sent in one parcel, and all brought out of the prosecutor's house at once, and unless you can give some evidence to show that it was stolen at different times you do not raise your point¹; but, even if you did, I should think it would be of no avail, for on the last winter circuit it appeared that a person at Brighton stole goods in the same way that you wish me to suppose that this prisoner did, for it was shown that he stole the articles one or two at a time, and under value, but that he carried them out of his master's house all together, the articles amounting in all to more than £5 value, and Mr. Baron Garrow, after much consideration, held that, as the articles were all brought out of the prosecutor's house together, it was a capital offense.

Verdict—Guilty.²

REX v. BIRDSEYE.

(Bedford Assizes, 1830. 4 Car. & P. 386.)

Indictment for stealing pickled pork, a bowl, some knives, and a loaf of bread.

It appeared that the prisoner entered the shop of the prosecutor and ran away with the pork. In about two minutes he returned, replaced the pork in a bowl, which contained the knives, and took away the whole together, threatening destruction to any one who followed him. In about half an hour after, he came back to the prosecutor's shop and took away the loaf.

Mr. Justice LITTLEDALE. This taking away the loaf cannot be given in evidence upon this indictment. I think that the prisoner's taking the pork, and returning in two minutes, and then running off with the bowl, must be taken to be one continuing transaction; but I think that half an hour is too long a period to admit of that construction. The taking of the loaf, therefore, is a distinct offense.

The prisoner was acquitted; the learned judge telling the jury that the felonious intent was not sufficiently made out.³

¹ Accord: *Ackerman v. State*, 7 Wyo. 504, 54 Pac. 228 (1898).

² Accord: *State v. Mandich*, 24 Nev. 336, 54 Pac. 516 (1898). Cf. *Scarver v. State*, 53 Miss. 407 (1876); *Cody v. State*, 31 Tex. Cr. R. 183, 20 S. W. 398 (1892).

³ See, also, *State v. Maggard*, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 484 (1900).

II. LARCENY FROM PARTICULAR PLACES.

Larceny from the house is not distinguished at common law from simple larceny, unless where it is accompanied with the circumstance of breaking the house at night, when it falls under another description, that of burglary. * * * Now by various acts of Parliament the benefit of clergy is taken away from larcenies committed in a house in almost every instance.¹

2 East, P. C. 623.

REX v. OWEN.

(Court for Crown Cases Reserved, 1792. 2 Leach, C. C. [4th Ed.] 572.)

Edward Owen was indicted for stealing 105 guineas, the property of James Foreman, in the dwelling house of Patrick Brady. Brady kept a public house in Holborn, into which Foreman was seduced by the prisoner, under pretense of dividing the value of a cross which the prisoner picked up and pretended to have found in the street, and then the prisoner obtained the 105 guineas from the prosecutor, under exactly the same circumstances as have been repeatedly given in evidence in the ring dropping cases.²

The jury found the prisoner guilty; but the judgment was respited, and the case reserved for the opinion of the twelve judges, on a question whether, as this was a taking from the person of Foreman, though in the dwelling house of Brady, the prisoner was ousted of his clergy under St. 12 Anne, c. 7.

Mr. Justice ASHURST, in February Session, 1793, said that the judges were of opinion that the prisoner was not, under the circumstances of this case, deprived of his clergy by St. 12 Anne, c. 7, and that this opinion was founded on the authority of the case of *Rex v. Campbell*, in January Session, 1792; for that, to bring a case within this statute, the property stolen must be under the protection of the house, and deposited therein for safe custody, as the furniture, plate, money kept in the house, and not things immediately under the eye or personal care of some one who happens to be in the house.³

¹ By statutes in England and in most of our states larceny from certain enumerated places has been made a substantive crime—as from a dwelling, a house, a building, a shop, a warehouse, an office, a vessel, etc.

² The statement of the case is printed from 2 East, P. C. 645.

³ Accord: *Commonwealth v. Lester*, 129 Mass. 101 (1880); *State v. Patterson* 98 Mo. 283, 11 S. W. 728 (1889). Contra: *Simmons v. State*, 73 Ga. 609, 54 Am. Rep. 885 (1884). See, also, *Henry v. State*, 39 Ala. 679 (1866); *Martinez v. State*, 41 Tex. 126 (1874).

REX v. TAYLOR.

(Court for Crown Cases Reserved, 1820. Russ. & R. 418.)

The prisoner was tried and convicted before Mr. Justice Park, in the year 1820, of stealing a watch in the dwelling house of John Wakefield, to the value of 40 shillings.

The prisoner lodged in the house of John Wakefield, and the prosecutor, who was an old acquaintance of the prisoner, and who could not get a bed in the public house where they met, accepted an invitation to take part of the prisoner's bed. They went home together, and neither John Wakefield nor any of his family knew of the prosecutor's being there, so that he was the guest of the prisoner. The prisoner stole the prosecutor's watch from the bed head.

It having been held that the statute of 12 Anne (St. 1, c. 7) does not extend to a man stealing in his own house, the learned judge doubted whether the prisoner was not to be considered as the owner of the house with respect to the prosecutor. The statute was made for the protection of property deposited in the house, and not on the person of the party; and the prosecutor was neither the occupier nor a settled inhabitant of the house in which the watch was taken. The learned judge respited the judgment, to take the opinion of the judges on this conviction.

In Easter Term, 1820, ten of the judges met and considered this case. The majority, viz., BURROUGH, J., HOLROYD, J., WOOD, B., BAYLEY, J., GRAHAM, B., RICHARDS, C. B., and ABBOTT, Lord C. J., held the conviction right.¹ RICHARDSON, J., BEST, J., and GARROW, B., contra.

III. ROBBERY.

There is also a kind of theft, rapine, which is the same with us as robbery, and it is another kind of handling against the will of the owner, and a like punishment follows each offense, and hence a robber is called a hardened thief, for who handles anything more against the will of the owner, than he who carries off by violence?

Bracton, f. 150, b.

¹ Accord: Rex v. Hamilton, 8 Car. & P. 49 (1837).

WRIGHT'S CASE.

(Upper Bench, 1649. Style 56.)

In the case of one Wright, brought upon the statute of hue and cry, ROLL, Chief Justice, said: That if a man's servant be robbed of his master's goods in the sight of his master, this shall be taken for a robbing of the master. And if one cast away his goods to save them from a robber, and the robber take them up, and carry them away, this is a robbery done to his person.

HARMAN'S CASE.

(King's Bench, 1701. 2 East, P. C. 736.)

Harman, being on horseback, desired Halfpenny to open a gap for him, and while he was so doing Harman took the opportunity, unperceived, to pick his pocket of his purse. Halfpenny, turning round and seeing the purse in Harman's hand, demanded it of him, and Harman answered him: "Thou villain, if thou speakest but a word of thy purse, I will pluck thy house over thy ears and drive thee out of the country, as I did John Somers."¹ And so he went away with his purse. On an indictment for robbery, the prisoner was held guilty of simple larceny only; the property being obtained by stealth, and not by violence or putting in fear.²

DAVIES' CASE.

(Old Bailey, 1712. 2 East, P. C. 709.)

Davies, alias Beard, was indicted for taking a gentleman's sword from his side, clam et secrète; but, it appearing that the gentleman perceived that Davies laid hold of his sword, and that he himself laid hold of it at the same time and struggled for it, this was adjudged robbery.³

¹ The menaces are inserted from the report of the case in 2 Rolle's Report, 154.

² Accord: Jackson v. State, 114 Ga. 826, 40 S. E. 1001, 88 Am. St. Rep. 60 (1902).

³ Accord: Williams v. Commonwealth (Ky.) 50 S. W. 240 (1899).

"Violence may be used for four purposes: (1) To prevent resistance. (2) To overpower the party. (3) To obtain possession of the property. (4) To effect an escape. Either of the first two makes the offense robbery. The last, I presume it will be conceded, does not. The third is a middle ground. In general, it does not make the offense robbery; but sometimes, according to some of the cases, it does." Pearson, J., in State v. John, 50 N. C. 167, 69 Am. Dec. 777 (1857).

HUGHES' CASE.

(Lancaster Assizes, 1825. 1 Lew. 301.)

Prisoners were indicted for robbery. It appeared in evidence that they, together with others, their companions, hung around the prosecutor's person in the streets of Manchester, and rifled him of his watch and money. It did not appear, however, that any force was used, or any menace; but they so surrounded him as to render all attempt at resistance hazardous, if not vain.

Per BAYLEY, J. In order to constitute robbery, there must be either force or menaces. If several persons so surround another as to take away the power of resistance, this is force.

Prisoners were convicted.¹

REX v. EDWARD.

(Winchester Assizes, 1833. 1 Moody & R. 257.)

Indictment for robbery.

The money was obtained from the witness by a threat to accuse her husband of an unnatural offense, and the money so obtained was the property of the husband, the prosecutor.

LITTLEDALE, J., said the case was new and perplexing. He thought it was rather a misdemeanor. To make a case of this description a robbery, the intimidation should be on the mind of the person threatened to be accused,² and the apprehension of the wife was of a different character. St. 7 & 8 Geo. IV, c. 2, § 7, is in terms confined to threats made to the party himself. The principle is that the person threatened is thrown off his guard, and has not firmness to resist the extortion; but he could not apply that principle to the wife of the party threatened. Even as a misdemeanor, the case was new, though he thought that the only way to treat the offense. He therefore directed an acquittal.

The prisoner was acquitted.

¹ See, also, *Commonwealth v. Snelling*, 4 Bln. (Pa.) 379 (1812); *Snyder v. Commonwealth* (Ky.) 55 S. W. 679 (1900).

² See *Rex v. Donnelly*, 1 Leach, 229 (1779). Cf. *Rex v. Knewland*, 2 Leach, 72 (1796); *Long v. State*, 12 Ga. 293 (1852).

In *Thompson v. State*, 61 Neb. 210, 85 N. W. 62, 87 Am. St. Rep. 453 (1901), it was held that a threat to accuse a person of an unnatural crime was sufficient violence to constitute robbery, and that the person so threatened was justified in killing the robber as a necessary means of defense.

HILL v. STATE.

(Supreme Court of Nebraska, 1894. 42 Neb. 503, 60 N. W. 916.)

POST, J.¹ Exception was taken also to the following instruction: "You are therefore instructed in this case, if you believe from the evidence beyond any reasonable doubt that, at the time of the alleged killing of Mattes Akeson, the defendant, Harry Hill, with John Benwell, had entered his dwelling house, armed with a deadly weapon or weapons, for the purpose of intimidating the deceased for the furtherance of their purpose to steal, take, and carry away by force and violence the money or any article of personal property of the deceased's dwelling house, and that in the prosecution of that purpose and design the defendants, or either of them, shot the deceased, and thereby caused his death, * * * that such killing would be murder in the first degree."

There appears to have been an error or omission in the transcribing of the above instruction, wherein the court is made to say that the accused might be convicted if he feloniously killed the deceased while engaged with his codefendant in attempting forcibly to take, steal, or carry away "any article of personal property of the deceased's dwelling house." But the objection to the instruction is upon other grounds, viz., that it authorizes a conviction provided the jury should find that the defendant forcibly entered the house of the deceased for the purpose of committing a larceny. Robbery at common law was defined as larceny committed by violence from the person of one put in fear. 2 Bishop, Criminal Law, 1156. By section 13 of our Criminal Code it is provided that "if any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatever with the intent to rob or steal, every person so offending shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the penitentiary not more than fifteen nor less than three years." The taking, according to each definition, must be from the person, since the crime of robbery is an offense as well against the person as against property. It is, however, not essential to a conviction for the crime named that the property be taken from the body of the person wronged. It is sufficient if taken from his personal presence or personal protection. 2 Bishop, Criminal Law, 1177, 1178; *United States v. Jones*, 3 Wash. C. C. (U. S.) 209, Fed. Cas. No. 15,494; *Clements v. State*, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385; *State v. Calhoun*, 72 Iowa, 432, 34 N. W. 194, 2 Am. St. Rep. 252. In the last-named case, which was under a statute similar to ours, the prisoner was shown to have bound the prosecutrix, and by putting her in fear extorted information respecting the place where

¹ Part only of this case is printed.

her money and other personal property was kept. Leaving her bound, he went to the place designated by her in another room of the same house and took the property named in the indictment. In the opinion the court, by Beck, J., uses this language: "The thought of the statute, as expressed in the language, is that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it." And in *Clements v. State* the prisoner, by threats of violence, detained the prosecutor in an outhouse while a confederate entered his dwelling, 15 paces distant, and took therefrom the property described, and the taking was held to be in the presence of the prosecutor, within the meaning of the statute defining robbery. The taking of the property of the deceased from his dwelling under the circumstances indicated by the instruction would have been robbery. It would also have sustained a conviction for larceny. *Brown v. State*, 33 Neb. 354, 50 N. W. 154. The objection to the instruction is, therefore, without merit.²

² See, also, *Williams v. State*, 37 Tex. Cr. R. 147, 38 S. W. 999 (1897); *State v. Kennedy*, 154 Mo. 268, 55 S. W. 293 (1899). Compare *Jackson v. State*, 114 Ga. 826, 40 S. E. 1001, 88 Am. St. Rep. 60 (1902).

CHAPTER XIV.

EMBEZZLEMENT.

If any servant or clerk, or any person employed for the purpose in the capacity of servant or clerk, to any person or persons whomsoever, or to any body corporate or politic, shall [by virtue of such employment] ¹ receive or take into possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for, in the name or on account of his master or masters, or employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use or in whose name or names, or on whose account the same was or were delivered to or taken into the possession of such servant, clerk, or other person so employed, although such money, goods, bond, bill, note, banker's draft, or other valuable security was or were not otherwise received into the possession of his or their servant, clerk or other person so employed. * * *

St. 39 Geo. III, c. 85.

REX v. SMITH.

(Court for Crown Cases Reserved, 1823. 1 Lew. 86.)

Thomas Smith was indicted under the above statute² for embezzling a £1 promissory note, and 17s. 6d., the property of his masters, H. and J.

The facts were as follows: H. and J. who farmed the tolls of Y. and also of Z., requested B., who was hired by them to collect at Y., to receive to their use the tolls collected at Z., and they desired the collector at Z. to pay them over to B. at convenient opportunities. B. appropriated to his own use the tolls so paid over by the collector of Z.

The question was whether this was an act of embezzlement within the meaning of the statute.

¹ The words in brackets are omitted in the present statute. St. 24 & 25. Vict. c. 96, § 68.

² St. 39 Geo. III, c. 85. The statute is omitted.

The prisoner was found guilty of the embezzlement, whereupon Holroyd, J., reserved the point for the consideration of the judges, of whom five² thought the conviction proper, and three³ that it was wrong.

REX v. SNOWLEY.

(Norwich Assizes, 1830. 4 Car. & P. 390.)

Embezzlement. It appeared that the prisoner was hired by the prosecutor to lead a stallion round the country during the season, and he was to charge for each mare 30s., and not to take less than 20s. He stated that his account contained every sum due to his master; but it was proved that a sum of 6s., which was the whole charge he had made for covering one mare, was not included in his account.

Mr. Justice J. PARKE (having conferred with Mr. Justice LITTLEDALE). This is not an embezzlement. To constitute an embezzlement, the prisoner must have received the money by virtue of his employment; and as it was his duty to take 30s., and not less than 20s., this sum 6s. was not received by him by virtue of his employment. He must, therefore, be acquitted.

Verdict—Not guilty.⁴

REGINA v. ASTON.

(Warwick Assizes, 1847. 2 Car. & K. 413.)

Embezzlement. The prisoner was indicted for embezzling the sum of 6s., received by him as the servant of John and Joseph Fulford.

The prosecutors were brewers at Birmingham, and the prisoner was their drayman, and was sent out daily with porter for his masters' customers, and also with a surplus quantity, which he had authority to sell at a certain fixed price only, viz., at 9s. 6d. a dozen. The prisoner sold a dozen of this porter at 6s. to Jeremiah Webb, in the month of July, 1846, but did not receive the money at the time of the sale, but said he should call for it afterwards. One of the Messrs. Fulford heard of the transaction from the customer, and told him to let the prisoner have the money, but this was un-

² Park, J., Burrough, J., Best, J., Hullock, B., and Bayley, J., because, though this was out of the ordinary course of the prisoner's employment, yet he was servant to H. and J., and in his character of servant to them had submitted to be employed by them to receive the notes and moneys, and had received them by virtue of his being so employed.

³ Abbott, L. C. J., Holroyd, J., and Garrow, B., because the prisoner did not receive the note, etc., by virtue of his employment, inasmuch as it was out of the course of his employment to receive them.

⁴ Accord: Reg. v. Harris, 25 Eng. L. & Eq. Rep. 579 (1854).

known to the prisoner; and on the 20th of August following, the prisoner having called for the money, the customer, Webb, paid it to him, and, the prisoner having denied the receipt of it to the prosecutors, he was apprehended.

Hayes, for the prisoner, objected that the money was not received by virtue of the prisoner's employment; the prosecutor having proved that the prisoner had no authority to sell at the price charged, and cited the case of *Rex v. Snowley*, 4 Car. & P. 390.

PATTESON, J., after conferring with PARKE, B., said that he had great doubts as to the authority of the case cited, and that Baron PARKE and himself also considered that, as the master in the present case had authorized the customer to make payment to the prisoner, the master was bound by that payment, and could not demand more of the customer, and that the evidence was sufficient to support the indictment.¹

Verdict—Guilty.

REGINA v. CULLUM.

(Court for Crown Cases Reserved, 1873. L. R. 2 C. C. 28.)

Case stated by the chairman of the West Kent Sessions.

The prisoner was indicted, as servant to George Smeed, for stealing £2, the property of his master.

The prisoner was employed by Mr. Smeed, of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London, and to receive back such return cargo, and from such persons, as his master should direct. The prisoner had no authority to select a return cargo, or take any other cargoes but those appointed for him. The prisoner was entitled, by way of remuneration for his services, to half the earnings of the barge, after deducting half his sailing expenses. Mr. Smeed paid the other half of such expenses. The prisoner's whole time was in Mr. Smeed's service. It was the duty of the prisoner to account to Mr. Smeed's manager on his return home after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed, and asked if he should not on his return take a load of manure to Mr. Pye, of Caxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him to return with his barge empty to Burham, and thence take a cargo of mud to another place, Murston. Going from London to Murston, he would pass Caxton. Notwithstanding this prohibition, the prisoner took a barge load of manure from London down to Mr. Pye, at

¹ In *Rex v. Harris*, 25 Eng. L. & Eq. Rep. 579 (1854), Parke, B., adhered to his ruling in *Rex v. Snowley*.

Caxton, and received from Mr. Pye's men £4 as the freight. It was not proved that he professed to carry the manure or to receive the freight for his master. The servant who paid the £4 said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom. Early in December the prisoner returned home to Sittingbourne, and proposed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London, and had returned empty to Burham, as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries, the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the £4 received from Mr. Pye for the freight for the manure.

The jury found the prisoner guilty, as servant to Mr. Smeed, of embezzling £2.

The question was whether, on the above facts, the prisoner could be properly convicted of embezzlement.¹

BOVILL, C. J. In the former act relating to this offense were the words "by virtue of his employment." The phrase led to some difficulty; for example, such as arose in *Reg. v. Snowley*, 4 C. & P. 390, and *Reg. v. Harris*, Dears. Cr. C. 344. Therefore in the present statute those words were left out; and section 68 requires instead that, in order to constitute the crime of embezzlement by a clerk or servant, the "chattel, money, or valuable security * * * shall be delivered to, or received, or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. The prisoner here, contrary to his master's order, used the barge for his (the servant's), own purposes, and so earned money which was paid to him, not for his master, but for himself; and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances, the money would not be received "for," or "in the name of," or "on account of" his master, but for himself, in his own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed.²

¹ Argument of counsel is omitted.

² Concurring opinions of Bramwell, B., and Blackburn and Archibald, JJ., are omitted.

"Whoever embezzles or fraudulently converts to his own use, or secretes, with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him, which may be the subject of larceny, or any

part thereof, shall be deemed guilty of larceny." Cr. Code Ill. (Rev. St. 1874, c. 38) § 74.

Similar statutes are in force in many states. It is generally held that a person cannot be convicted under these statutes on an indictment for larceny, simply, as at common law; that nothing that was larceny at common law is larceny under these statutes, and nothing that is larceny under the statutes is larceny at common law; but that, in order to convict a person of larceny under these statutes, the indictment must set out the acts of embezzlement and then aver that so the defendant committed the larceny. *Fulton v. State*, 13 Ark. 168 (1852); *Kibs v. People*, 81 Ill. 599 (1876); *Commonwealth v. Doherty*, 127 Mass. 20 (1879); *State v. Harmon*, 106 Mo. 635, 18 S. W. 128 (1891); *Colip v. State*, 153 Ind. 584, 55 N. E. 739, 74 Am. St. Rep. 322 (1899); *Zysman v. State*, 42 Tex. Cr. R. 432, 60 S. W. 669 (1901). But see *State v. Taberner*, 14 R. I. 272, 51 Am. Rep. 382 (1883); *State v. Shirer*, 20 S. C. 392 (1883).

In England and many of the United States statutes exist providing that a person indicted for larceny may be convicted of embezzlement. In *Huntsman v. State*, 12 Tex. App. 619 (1882), and *State v. Harmon*, 106 Mo. 635, 18 S. W. 128 (1891), such statute is declared to infringe the constitutional privilege of the accused to be informed of "the nature and cause" of the accusation against him.

In *Reg. v. Gorbutt*, Dears. & B. 166 (1857), it was held that such statute does not authorize a conviction of larceny, if there is evidence of embezzlement only.

CHAPTER XV.

OBTAINING PROPERTY BY CHEATS AND FALSE
PRETENSES.

SECTION 1.—GENERAL PRINCIPLES.

Forasmuch as many light and evil-disposed persons, not minding to get their living by truth, according to the laws of this realm, * * * knowing that if they come to any * * * goods, chattels and jewels by stealth, that then they, being thereof lawfully convicted according to the laws of this realm, shall die therefore; have now of late falsely and deceitfully contrived, devised and imagined privy tokens, and counterfeit letters in other men's names, unto divers persons their special friends and acquaintances, for the obtaining of money, goods, chattels and jewels of the same persons: * * * Be it ordained * * * that if any person or persons falsely and deceitfully obtain or get into his or their hands or possession, any money, goods, chattels, jewels, or other things of any other person or persons, by color and means of any such false token or counterfeit letter * * * every person and persons so offending, and being thereof lawfully convict, * * * shall suffer, etc.

St. 33 Hen. VIII, c. 1.

REGINA v. JONES.

(King's Bench, 1703. 1 Salk. 379.)

Mr. Parker moved to quash an indictment, which was that the defendant came to A., pretending B. sent him to receive £20, and received it, whereas B. did not send him. Et PER CUR. It is not indictable unless he came with false tokens; we are not to indict one man for making a fool of another. Let him bring his action.¹

¹ See, also, chapter II, § 7, supra.

All persons who knowingly and designedly by false pretence or pretences shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same, * * * shall be deemed offenders against law and public peace.¹

St. 30 Geo. II, c. 24.

SECTION 2.—THE PROPERTY OBTAINED.

PEOPLE v. CUMMINGS.

(Supreme Court of California, 1896. 114 Cal. 437, 46 Pac. 284.)

VAN FLEET, J.² Defendant was accused by information of the crime of obtaining property by false pretenses, under section 532 of the Penal Code; the property charged to have been obtained being described as two certain parcels of land. He demurred to the information as not stating an offense. The demurrer was sustained, and the people appeal; the sole question being whether land is such property as to be the subject of the offense sought to be charged.

The offense of false pretenses under the English statutes has always been construed as largely analogous to and closely bordering upon that of larceny, and as applying only to personal property, which was capable of manual delivery, and the subject of the latter offense, and has always been punishable in much the same manner as larceny. Real property under the English law was never the subject of the offense either of cheating or of false pretenses. Being incapable of larcenous asportation, it was not regarded as requiring at the hands of the criminal law the same protection as personalty.

Our American statutes upon the subject have all followed more or less closely those of England. As indicated, there are slight differences in language, but in substantive purpose and effect they are the same. Some, instead of employing the specific terminology of the English statutes in designating the character of the property made the subject of the offense, have used more general and perhaps more comprehensive terms, such, for instance, as those found in the provision of our Code above quoted. In their interpretation, however, of the purpose and effect of these statutes, the American courts, by reason, no doubt, of the origin of the offense, and in obedience to a well-established rule of statutory construc-

¹ The present statute in England is St. 24 & 25 Vict. c. 96, § 88.

² Only extracts from the opinion are printed.

tion, have closely followed in a general way that of the English courts, and the statutes of the various states, however general their terms, have been uniformly held to apply only to personal property of a larcenous nature.

The judgment is affirmed.

SECTION 3.—THE INTEREST ACQUIRED.

CANTER v. STATE.

(Supreme Court of Tennessee, 1881. 7 Lea, 349.)

MACFARLAND, J., delivered the opinion of the court.¹

This is a conviction for obtaining goods under false and fraudulent pretenses. When analyzed, the charge means this: that upon the pretense of the defendant that he could not try on the articles at the store to see if they would fit the owner permitted him to take them away for the purpose of trying them on, upon his promise to return them; the defendant at the same time representing that Leming owed him \$4.75, and would come and buy the articles for him and pay for them. And this is the case made by the proof. The merchant in his testimony says in substance that there was no sale of the goods, the title did not pass, they were to be returned in any event, and there was to be no sale until Leming came and paid for the goods; that he would not sell to either of them, except for the cash. The defendant, however, failed to return the goods, and it was proven that Leming owed him nothing and had not promised to purchase the goods for him.

The motion of the defendant to arrest the judgment should have been sustained.

First. The indictment does not make a case under our statute, which is said to be almost a transcript of the English statute (St. 30 Geo. II, c. 24) and of the New York statute. To make out a case, it must appear that the owner meant to part with the right of property in the thing obtained, and not the mere possession of it. If the owner part with the possession only, and not the right of property, it is larceny. See Archbold Cr. Pl. & Pr. marg p. 416. Or if the felonious purpose to appropriate the goods be formed after the possession was obtained, it might be a felonious breach of trust under our statute.

The judgment of the circuit court must be arrested.²

¹ Part of the opinion is omitted.

² Accord: State v. Vickery, 19 Tex. 326 (1857); Reg. v. Kilham, L. R. 1. C. C. 261 (1870); State v. Anderson, 47 Iowa, 142 (1877); Lucas v. People,

SECTION 4.—THE PRETENSE.

REX v. SPENCER.

(Worcester Assizes, 1828. 3 Car. & P. 420.)

False pretense. The indictment stated that the prisoner "did offer and pay a certain paper writing, partly printed and partly written, purporting to be the promissory note of Coleman, Smith & Morris, for the payment of £1, as copartners and bankers trading under the firm of C., S. & M., and did then and there unlawfully and falsely pretend to one Peter Pollard that the same was a good and available note of the said C., S. & M., whereas, etc., it was not, at the time it was so offered, a good and available note, as he, the said F. S., well knew," etc.

It was proved that the prisoner gave the note to the prosecutor in payment for meat; and another witness proved that he had told the prisoner that the Leominster Bank (from which the note was issued) had stopped payment. It was also shown, on the part of the prosecution, that the banking house at Leominster was shut up, and that Messrs. Coleman & Morris had become bankrupts; but it appeared, on the cross-examination, that Mr. Smith, the third partner, had not become bankrupt.

Busby, for the prisoner, objected that, as one of the partners had not become bankrupt, the note remained an available note as it respected him; and non constat that, if presented to him, it would not have been paid.

GASELEE, J. On this evidence the prisoner must be acquitted, because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away.¹

Verdict—Not guilty.

75 Ill. App. 662 (1896); *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539 (1898).

"The law does not make it an element of the offense of obtaining money or property under false pretenses that it shall be obtained for the person making the pretenses himself, or that it shall be intended to obtain it for another." Elliott, J., in *Musgrave v. State*, 133 Ind. 307, 32 N. E. 885 (1892). Accord: *State v. Balliet*, 63 Kan. 707, 66 Pac. 1005 (1901).

¹ "It is quite sufficient to sustain the charge of false pretenses if a person knowingly presents the note of a bank which has stopped payment, as a current note, though there may be a dividend afterwards, and a great portion of the value paid." Crowder, J., in *Reg. v. Evans*, 8 Cox, C. C. 259 (1859). See, also, *Commonwealth v. Stone*, 4 Metc. (Mass.) 43 (1842); *People v. Bryant*, 119 Cal. 295, 51 Pac. 960 (1898); *State v. Bourne*, 86 Minn. 432, 90 N. W. 1108 (1902).

REGINA v. LEE.

(Court for Crown Cases Reserved, 1863. Leigh & C. 309.)

Lewis Lee was indicted and tried for obtaining money by false pretenses.

The prosecutor owed prisoner £16. 10s. for a heifer and some hay, and on Friday, the 27th February, prisoner called on him in the evening to settle the debt. Prosecutor put down two £10 notes, but the prisoner said he could not give change, upon which it was arranged that the prisoner should take one of the £10 notes, and that the balance should be paid at the Honiton Market the next day, which was done. Prisoner then said: "I am going to pay" (or "I've got to pay") "my rent to the squire on the 1st of March; but, as that is Sunday, I am going to pay it the next day. Will you advance £10 for your father-in-law on the rent of the flax field?" Prosecutor replied: "I don't wish to be mixed up with my father-in-law's affairs; but you will see him on Monday or Tuesday, when you can make a settlement of everything." Prisoner then said: "Will you lend me £10 till Tuesday or Wednesday, and I will give you a note of hand for it to make it all businesslike?" Prosecutor then lent him £10, and prisoner gave the prosecutor a formal promissory note for that amount. Prisoner did not say he required the sum of £10 to make up his rent; but the prosecutor stated that he believed that was what he wanted it for. The prosecutor in his evidence stated that, if he had not told him he was going to pay his rent, he should not have let him have the money.¹

The jury found the prisoner guilty, and stated their opinion that the prisoner's statement that he was going to pay his rent on the Monday was a false pretense, and that the money was advanced on the credit of that false pretense.

COCKBURN, C. J. We are all agreed that the case proved against the prisoner will not warrant the conviction. There is no false pretense of any existing fact. The pretense alleged is that he had got to pay his rent, while in fact he had no intention of paying it, but meant to appropriate the money to his own purposes. That is not a false pretense of an existing fact.

Conviction quashed.²

¹ Part of this case is omitted.

² Accord: *Rex v. Goodhall*, Russ. & Ry. 461 (1821); *Rex v. Douglass*, 1 Moo. 462 (1836); *Dalton v. State*, 113 Ga. 1037, 39 S. E. 468 (1901).

REGINA v. MURPHY.

(Court for Crown Cases Reserved (Ireland) 1876. Ir. R. 10 C. L. 508.)

The prisoner, Mary Murphy, was convicted at the Commission for the county of the city of Dublin in April, 1876, of obtaining goods under false pretenses.¹

Evidence was given by several persons that the prisoner had written letters to the witnesses inclosing half notes, and requesting that goods should be forwarded to her; that the goods were sent, but the prisoner did not send the second halves of the notes. Several of the witnesses held the corresponding halves of the notes sent to the others. The police constable who arrested the prisoner found several half notes with her.

The case was left to the jury, who found the prisoner guilty.

James Murphy, Q. C., in support of the prosecution. In this case the sending of the half notes was an intimation that the person from whom the goods were sought was not to rely upon a mere promise to pay. It was an intimation that the transaction was to be a ready money one; and if the intimation of such a state of facts was made with intent to defraud, and induced parties to part with their goods, that is a false pretense.

[MORRIS, C. J. The only question is, did the sending of the half notes imply that the prisoner had the corresponding halves? O'BRIEN, J. You say, Mr. Murphy, that the mere act of sending the half notes was a representation that the prisoner had the other halves?] Yes; upon the authority of *R. v. Giles*, L. & C. 205.

MORRIS, C. J., stated that the court were unanimously of opinion that the conviction should be affirmed.

Conviction affirmed.²

REGINA v. JONES.

(Court for Crown Cases Reserved, 1897. [1898] 1 Q. B. 119.)

The judgment of the court (Lord RUSSELL of Killowen, C. J., WRIGHT, KENNEDY, DARLING, and CHANNELL, JJ.) was delivered by

Lord RUSSELL of Killowen, C. J. This case was reserved for our consideration by the Recorder of Worcester. The defendant was indicted in two counts. In the first he was charged under the larceny act of 1861, with obtaining goods by false pretenses.³

The facts were shortly these: The prosecutor kept an eating house, and on June 20th the defendant went in and asked for some soup.

¹ Part of this case is omitted.

² See, also, *Rex v. Taylor*, 65 J. P. 457 (1901). Cf. *Cowan v. State*, 41 Tex. Cr. R. 617, 56 S. W. 751 (1900).

³ Part of this case is omitted.

He was told that there was none ready, and thereupon asked for some cold beef. He was told that there was none, but that he could have some cold lamb and salad; and this he accordingly ordered. He then ordered half a pint of sherry, and went upstairs to have his meal. While there he rang the bell, and ordered another half pint of sherry. Subsequently he again rang the bell, and asked what there was to pay, and, upon being told four shillings, said that he had no means of paying, that he had no money, and had (as was the fact) only a halfpenny upon him. Such was the state of the facts. All that the defendant did was to go into an eating house, order food and refreshment, and eat, but not pay for it. No question was put to him, and no inquiry was made of him, by the prosecutor as to his means; nor was any statement made by him whether he had means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the defendant obtained consumable articles by false pretenses. We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretense by conduct; for example, the case of *Rex v. Barnard*, 7 C. & P. 784, where a cap and gown were used by a man who had no right to wear them, in order to convey the notion that he was a member of the University. Nor do we in any way dispute the authority of another class of cases; that is, where a man gives a check on a bank where he either has no account or has not sufficient means to meet the check, and must have known that he had not sufficient means. In the present case the defendant did nothing beyond what I have already stated. No inquiry was made of him, and no statement was made by him. Under the circumstances, we do not think that the case could properly be left to the jury on the first count. There was no evidence that the defendant had obtained these articles by false pretenses.

Conviction quashed on first count.²

REGINA v. BRYAN.

(Court for Crown Cases Reserved, 1857. Dears. & B. 265.)

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of London.

At a Session of Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, on the 2d day of February, A. D. 1857, John Bryan was tried before me for obtaining money by false pretenses.

² The conviction on the second count, framed in section 13 of the debtors' act of 1869, was affirmed.

There were several false pretenses charged in the different counts of the indictment, to which, as he was not found guilty of them by the jury, it is not necessary to refer. But the following pretenses were, among others, charged: "That certain spoons produced by the prisoner were of the best quality; that they were equal to Elkington's A (meaning spoons and forks made by Messrs. Elkington, and stamped by them with the letter A); that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretenses were made use of by the prisoner for the purpose of procuring advances of money on the spoons in question offered by the prisoner by way of pledge, and he thereby obtained the moneys mentioned in the indictment by way of such advances. The goods were of inferior quality to that represented by the prisoner, and the prosecutors said that, had they known the real quality, they would not have advanced money upon the goods at any price. They moreover admitted that it was the declaration of the prisoner as to the quality of the goods, and nothing else, which induced them to make the said advances. The moneys advanced exceeded the value of the spoons. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as Elkington's A and that the foundations were of the best material, knowing that to be untrue, and that in consequence of that he obtained the moneys mentioned in the indictment. The prisoner's counsel claimed to have the verdict entered as a verdict of not guilty, which was resisted by the counsel for the prosecution; and, entertaining doubts upon the question, I directed a verdict of guilty to be entered, in order that the judgment of the Court for the Consideration of Crown Cases might be taken in the matter; and the foregoing is the case on which that judgment is requested.

RUSSELL GURNEY.

B. C. Robinson, for the prisoner. This is simply a misrepresentation of quality, and is not within the statute. A representation that a thing is in specie that which it is not has been held to be within the statute; but there is no authority to show that a mere misrepresentation of the quality of an article is.

Lord CAMPBELL, C. J. With regard to quality it has been said that it is lawful to lie. The seller exaggerates, and the buyer depreciates the quality. The only specific fact here is that the spoons were equal to Elkington's A.

B. C. Robinson. All the representations are mere vaunting or puffing of the goods. I cannot contend that the prisoner did not tell a willful lie. No doubt he did. But the articles he proposed to pledge were plated spoons; and they were plated spoons, although of an inferior quality to that which he represented them to be. In *Regina v. Roebuck, D. & B. 24*, the chain was represented to be silver, when it was not silver, but base metal. In *Regina v. Abbott*, 1 Den. C. C. 273, the cheese was not of the kind it was represented

to be. The bulk of the cheese was said to be the same as the taster, when it was not. To make this case analogous to those, the representation must have been that the spoons were actually Elkington's A, and not equal to Elkington's A.

POLLOCK, C. B. Would it be indictable to say that a cheese came from a particular dairy, when it did not?

B. C. Robinson. That would be a much stronger case than this, and would resemble *Regina v. Abbott*; but if this conviction is good, a man selling beer as treble X, when it was double X, would be indictable, and who is to decide between buyer and seller in such cases?

COLERIDGE, J. If mere puffing by the seller would be indictable, depreciation by the buyer would be equally so. "It is nought, it is nought, saith the buyer; but when he goeth his way he boasteth."

B. C. Robinson. If the representation had been that the spoons were in fact Elkington's A, this case would have resembled *Regina v. Dundas*, 6 Cox, C. C. 380, where a spurious blacking was sold as blacking of Everett's manufacture, and *Regina v. Ball*, Car. & M. 249, in which articles were represented to be silver which were not silver. In both those cases the misrepresentation was as to the species, not as to the mere quality of the article. If such representations were to be held within the statute, trade could not be carried on with safety. The jury would in each case be made the judges of the offense; quality being in most cases a matter of opinion only.

G. Francis, for the crown. This is in fact a misrepresentation of quantity, and substantially the same as *Regina v. Sherwood*, D. & B. 251.

Lord CAMPBELL, C. J. Of the quantity of the silver?

G. Francis. Yes; Elkington's A is an article of ascertained manufacture, and by representing the spoons to be equal to Elkington's A the prisoner represented that they were covered with the same quantity of silver as Elkington's spoons would be covered with. The money was, therefore, obtained by a false representation that there was a greater weight of silver than there really was, and therefore there was a false pretense of an existing fact, within the statute. Secondly, if the representation was of quality merely, it is within the statute. The money was obtained by the representation, and the jury have found the representation was made with intent to defraud.

B. C. Robinson, in reply. The articles were of the species represented.

POLLOCK, C. B. Suppose a publican represents that his beer is not really Guinness' beer, but equal to Guinness'?

Lord CAMPBELL, C. J. The goods were the goods bargained for, but of inferior quality.

BRAMWELL, B. What would you say to the sale of a paste pin for a diamond pin?

B. C. Robinson. There the species would not be the same; but it would not do if the representation was that the diamond was "of the first water," when it was not.

ERLE, J. I am also of opinion that this conviction cannot be sustained, not on the ground that the falsehood took place in the course of a contract of sale or pawning, but on the ground that the falsehood is not of that description which was intended by the Legislature. It is a misrepresentation of what is more a matter of opinion than a definite matter of fact. Whether these spoons in their manufacture, and in the electrotype, were equal to Elkington's A, or not, cannot be, as far as I know, decidedly affirmed or denied in the same way as a past fact can be affirmed or denied; but it is in the nature of a matter of opinion.

Now, looking at all the cases that have been decided upon the statute, those that have been the subject of the greatest comment appear to me to fall within the principle relating to putting off counterfeit articles in sales where the substance of the contract is falsely represented, and by reason thereof the money is obtained. In *Regina v. Roebuck* the thing sold was not the thing which it was sold for—a silver chain. Here silver, though in form an adjective, is in reality the substance of the contract. The silversmith had no intention of buying a chain; but he intended to buy silver, and what was represented to him to be silver was not silver, though it was a chain. The property in the chain passed, and the money was paid; still clearly there was a false pretense as to the silver. And so in the case of *Regina v. Ball*. So, also, in the case of *Regina v. Abbott*, the substance of the contract was not a mere cheese, a thing in the shape of a cheese, of any quality; but the substance of the purchase was a Cheddar cheese (or some other species of cheese), and the taster which a fraudulent person had inserted in the cheese sold was of that species, and it was sold with a false affirmation that the article was Cheddar cheese, which would be a totally different article from the Gloucester cheese, or whatever the substance was said to be of the cheese that was sold. In the case of *Everett's blacking* it is the same thing. We have it in evidence in that case that a new blacking, salable in the neighborhood under the name of *Everett's blacking*, was a vendible article. The prosecutor purchased it for the purpose of retailing it, and unless it had been *Everett's blacking* he would have had no demand for it. The question whether it was *Everett's blacking* was as to the substance of the article. It was not a blacking he wanted. It was *Everett's*. And, though it is in form an adjective, it is in reality the substance of the bargain. These are cases of putting off counterfeit articles. As to the case of *Regina v. Kenrick*, 5 Q. B. 49, although in the case of *Rex v. Pywell*, 1 Starkie, 402, it had been held not indictable to praise the quality of a horse, knowing him not to be worthy of the praise put upon him, yet in *Regina v. Kenrick*, as far as I understand it, and

I was counsel for the man, the fact which brought the case within the definition of the crime was the fact that Kenrick averred that the horses had been the property of a lady deceased, were now the property of her sister, had never been the property of a horse dealer, and were quiet and proper for a lady to drive. The purchaser wanted those horses for a woman of his family. The substance of the contract, in his mind, was that they were the property of a lady who had driven the horses, and it was a false assertion of a definite existing fact to say, "They are the property of her sister now," when they were in fact the property of a horse dealer, and had run away and produced a fatal accident. The case of *Regina v. Kenrick* was not the warranting a horse sound, as in the case of *Rex v. Pywell*; but it was the affirming a false fact, which the party knew to be false, and on that ground the conviction proceeded. It seems to me that these cases, which have given rise to a great deal of observation, fail to bear out the principle contended for by the prosecution. No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion. Still it must be done, and the present case appears to me not to support a conviction upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to *Elkington's A*, but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendee has in substance the article contracted for, namely, plated spoons.¹

WILLES, J. My opinion is of little value after those which have been expressed; but, such as my opinion is, I am bound to pronounce it, and I do so with the less diffidence because it was the considered opinion of the late Chief Justice Jervis, than whom no man who ever lived was more competent to form an opinion upon the subject. I am of opinion that the conviction was right, and that it ought to be affirmed. It appears to me that a great number of observations have been brought to bear upon the construction of the statute which would not have been attended to if the words of the statute had been looked at, and I cannot help thinking that in many of the cases to which reference might be made, and they are very numerous, upon this subject, the judgments would have commanded more attention in after times if the words of the statute had been attended to, and those who delivered those judgments had not permitted themselves to consider, instead, whether a particular view would or would not be convenient to trade, either in its present state or in the state to which it might be reduced by a proper administration of the law. I think that the words of the statute should be implicitly followed, and the Legislature obeyed according to the terms in which it has expressed

¹ Part of this opinion is omitted. Campbell, C. J., Cockburn, C. J., Pollock, C. B., Coleridge, Cresswell, Crompton, and Crowder, JJ., and Watson and Channell, BB., delivered concurring opinions.

its will in St. 7 & 8 Geo. IV, c. 29, § 53. I am looking to the words of that section, and I am unable to bring myself to think that the Legislature was at all dealing with anything in the nature of a distinction between the case of property fraudulently obtained by a fraudulently obtained contract and goods obtained without any contract, but fraudulently obtained. I cannot help thinking that, if the attention of the framers of the statute had been directed to any such possible operation of it, they would, in the spirit in which the section is framed, have enacted, in terms even more clear than those of the fifty-third section, that that which is obtained by fraud shall not benefit the fraudulent person, and that the interposition of a contract, also obtained by fraud, ought not to make any difference in favor of the cheat. The section commences with the recital that "a failure of justice frequently arises from the subtle distinction between larceny and fraud." That is the recital, and I had on my mind an impression that the recital of a statute may have the effect of enlarging, but not of restraining, the operation of the subsequent enactment. The enacting part of the section is: "If any person shall by any false pretense obtain from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor." And it appears to me that the only proper test to apply to any case is whether it was a false pretense by which the property was obtained, and whether it was obtained with the intention to cheat and defraud the person from whom it was obtained.

Now in this case it should seem that there was a false pretense. There was a pretense that the goods had as much silver upon them as Elkington's A, and there was also the pretense that the foundations were of the best material. If I could bring myself to take the view, which my Brother ERLE has taken, that this was mere matter of opinion, and not matter of fact, which could be ascertained by inspection or calculation, possibly I might take the same view of the case; but it appears to me that, on the face of the case, it should seem that Elkington's A must have been, for practical purposes, a fixed quantity. The quantity of silver on it must have been fixed, and the proper material, the best material for the foundation of such plated articles, must have been a well-known quality in the trade, because it appears that the prisoner made a statement with respect to the quantity of silver, and the quality of the foundation, with the intent to defraud. It appears that the persons who made the advances were thereby defrauded, and thereby induced to make the advances, and the jury have found that the statements were known by the prisoner to be untrue, and that in consequence of those statements he obtained the money mentioned in the indictment. It appears to me that for all practical purposes that ought to be taken to be a sufficient fact, coming within the region of assertion and calculation, and not mere opinion, and that it should be considered as a

false pretense. Well, then, the statute says—"obtain from any other person any chattel, money, or valuable security." It is found in this case that the money was obtained. If the matter was a simple commendation of the goods, without any specific falsehood as to what they were—if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, and knew what they were—I apprehend it would have been easily disposed of by the jury, who were to pass an opinion upon the subject, acting as persons of common sense and knowledge of the world, and abstaining from coming to any such conclusion as that praise of that kind should have the effect of making the party resorting to it guilty of obtaining money on a false pretense. I say nothing on the effect of a simple exaggeration, except that it appears to me it would be a question for the jury in each case whether the matter was such ordinary praise of the goods (*dolus bonus*) as that a person ought not to be taken in by it, or whether it was a misrepresentation of a specific fact material to the contract and intended to defraud, and did defraud, and by which the money in question was obtained. Well, then there is the latter part of the section—"with intention to cheat and defraud any person of the same." It must be with the intent to cheat and defraud the person of the same. I am unable to bring my mind to any anxiety to protect persons who make false pretenses "with intent to cheat and defraud." It was stated in the evidence by the prosecutor, "I would have advanced nothing but for the misrepresentation," and it was found by the jury that the money was obtained by the misrepresentation. But it is said that the effect of establishing such a rule as that for which I contend would be to interfere with trade. No doubt it would, and I think ought to, prevent trade being carried on in the way in which it is said to be carried on. I cannot help expressing my regret if trade is carried on, and I do not believe it is generally carried on, by persons making false pretenses with the intention to cheat or defraud persons of their money. I am far from wishing to interfere with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to fair cheapening, on the other. Those are things persons may expect to meet with in the ordinary and usual course of trade. But I cannot help thinking that people ought to be protected from any such acts as those I have referred to being resorted to for the purpose and with intent to cheat or defraud purchasers of their money or tradesmen of their goods. If the result of it would be to multiply prosecutions, that must be because we live in an age in which fraud is multiplied to a great extent, and, amongst others, in this form. I agree in what the late Chief Justice Jervis said as peculiarly applicable to such a supposed state, though I hope not to ordinary trade—that if there be such a commerce as requires to be protected by the statute being limited in the mode suggested, it ought to be made honest

and conform to the law, and not the law bent for the purpose of allowing fraudulent commerce to go on. I cannot help thinking, therefore, upon the plain construction of St. 7 & 8 Geo. IV, c. 29, § 53, that the prisoner in this case, having fraudulently represented that there was a greater amount of silver in the articles pledged and that there was a superior foundation of metal, that being untrue to his knowledge, for the purpose of defrauding the prosecutors of their money, which he accordingly obtained, he was therefore indictable, and that the conviction ought to be affirmed.²

Conviction quashed.³

REGINA v. ARDLEY.

(Court for Crown Cases Reserved, 1871. L. R. 1 C. C. 301.)

Case stated by the Chairman of Quarter Sessions for the County Palatine of Durham.

Indictment for obtaining £5 and an Albert chain of the value of 7s. 6d. by false pretenses.

The material facts were as follows:

The prisoner went into the shop of the prosecutor, who was a watchmaker and jeweler, and stated that he was a draper, and was £5 short of the money required to make up a bill, and asked the prosecutor to buy an Albert chain which he (the prisoner) was then wearing. The prisoner said: "It is 15-carat fine gold, and you will see it stamped on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth £5 to sell as old gold." The prosecutor bought the chain, relying, as he said, on the prisoner's statement, but also examining the chain, and paid £5 for it, and gave also to the prisoner in part payment a gold Albert chain valued at 7s. 6d. The prisoner's chain was marked "15 ct." on every link, and in a very short time afterwards he (the prisoner) was apprehended, and then wore another Albert chain of a character similar to that sold to the prosecutor; this also being marked "15 ct." on every link. It was proved that "15 ct." was a hall-mark used in certain towns in England, and placed on articles made of gold of that quality, and that chains when assayed are generally found to be one grain less than the mark, exceptionally two grains.

² Bramwell, B., delivered a concurring opinion.

³ See, also, *People v. Jacobs*, 35 Mich. 36 (1876); *State v. Paul*, 69 Me. 215 (1879); *People v. Morphy*, 100 Cal. 84, 34 Pac. 623 (1893).

"It is not the law of this state, as we understand it, that a man may be guilty of larceny by false pretense because he has not title to either the real estate or personal property which he undertakes to sell, or says he owns, provided he vests good title in the purchaser at the time he pays the consideration for the property." Parker, C. J., in *People v. Wheeler*, 169 N. Y. 493, 62 N. E. 572 (1902).

The chain bought by the prosecutor was assayed, and found to be of a quality a trifle better than 6-carat gold, and of the value in gold of £2. 2s. 9d. It was proved that, had it been 15-carat gold, it would have been worth £5. 10s. Adding the charge for what is called "fashion" or "make," and the price of a locket attached, the chain bought by the prosecutor would be sold for £3. 0s. 3d.; but, had it been 15-carat, it would have been sold for £9. There were no drapery goods or anything connected with such trade found on the prisoner; but, when arrested, he had in his possession a license to sell plate, two watches, two white-metal watch guards, and the chain obtained from the prosecutor.

The chairman was asked by the counsel for the prisoner to stop the case, on the authority of *Reg. v. Bryan, Dears. & B. C. C. 265*, but declined to do so, and left the case to the jury, who found the prisoner guilty, and said they found that the prisoner knew that he was falsely representing the quality of the chain as 15-carat gold.

BOVILL, C. J.¹ The question which we have to consider in this case is whether there was evidence to go to the jury on which they could find the prisoner guilty of obtaining money under false pretenses. I think there clearly was evidence, and that it would have been quite impossible for the learned chairman with any propriety to stop the case. There were, in addition to the representations as to the quality of the gold, distinct statements of matters of fact, and there was evidence of the falsehoods of these statements. The prisoner stated that he was a draper, and was £5 short of the money required to make up a bill. But there were no drapery goods, nor anything connected with such trade, found on the prisoner; but, when arrested, he had in his possession a license to sell plate, two watches, two white-metal watch guards, and the chain obtained from the prisoner, and he wore another Albert chain of a character similar to that sold to the prosecutor, this also being marked 15-carat gold on every link. Looking, therefore, at the whole of the evidence, there is sufficient ground on which the finding of the jury may be supported and the conviction sustained.

But the jury have further found that the prisoner, when he represented the chain to be 15-carat gold, knew this representation to be false. And the question whether the conviction can be supported upon that finding alone stands upon a somewhat different footing. The cases have drawn nice distinctions between matters of fact and matters of opinion, statements of specific facts and mere exaggerated praise. It is difficult for us, sitting here as a court, to determine conclusively what is fact and what is opinion, what is a specific statement and what exaggerated praise. These are questions for the jury to decide. And the prisoner has this additional

¹ Arguments of counsel and concurring opinions of Willes and Byles, JJ., and Channell and Pigott, BB., are omitted.

security, that the jury have to consider not only whether the statements made are statements of fact, but also whether they are made with the intention to defraud.

The case which has been most pressed upon us is *Reg. v. Bryan, Dears. & B. C. C. 265*. The representation in that case was that certain plated spoons were "equal to Elkington's A." Prima facie that representation would seem to be a mere matter of opinion, and the court held that it was not sufficient to support the conviction. But many of the judges expressed the opinion that there might well be cases in which misrepresentations, though as to quality, would be within the statute. Cockburn, C. J., says: "If the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing." Pollock, C. B., says: "I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different; even in quality, from what it was, the statute would apply." It is plain that these learned judges considered that a specific representation of quality, if known to be false, would be within the statute. Coleridge, J., expressly concurs in the observations of Pollock, C. B. Erle, J., at the close of his judgment, says: "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion. Still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A, but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendor has in substance the article contracted for, namely, plated spoons." Crompton, J., also considered that the statute applies "when the thing sold is of an entirely different description from what it is represented to be." Willes, J., who dissented from the judgment of the court, goes the whole length of saying that a representation as to quality, if known to be false, is enough to support a conviction. And Bramwell, B., leans to the same opinion.

Applying these observations to the present case, the statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was 15-carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore, whether we look at the whole of the evidence, or only at that which goes to show the quality of the chain, the conviction is good. The case differs from *Reg. v. Bryan, Dears. & B. C. C. 265*, because here

there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain.

Conviction affirmed.²

SECTION 5.—EFFECTIVENESS OF THE PRETENSE.

RÉGINA v. ENGLISH.

(Kent Assizes, 1872. 12 Cox, C. C. 171.)

False pretenses.³ The prosecutor was a brickmaker, and in consequence of an advertisement issued by the defendant went down to see the field, and was shown over it and inspected the earth and soil of the field, and also examined a clump of bricks upon the field, said to have been made out of the earth and soil of the field; but evidence was given of the specific false pretenses alleged, and he swore he was induced by means of these representations, and in the belief that they were true, to enter into the agreement. And evidence was also given to show that they were to the knowledge of the defendant false, and intended to deceive and defraud. It was further sworn by the prosecutor and his witnesses that the bricks shown to him as made from the soil of the field had in fact been made from other earth, as known to the defendant.

The case had been previously tried before BRAMWELL, B., when the jury were discharged.

At the close of the case—

COCKBURN, C. J. (BRAMWELL, B., having previously directed the jury in the same way). There is a case for the jury on the counts which charge that the prosecutor, by means of the false pretenses, was induced to enter into the agreement. The jury must be satisfied, however, not only that the pretenses were false and fraudulent, but that the prosecutor was induced by means of them to enter into the agreement.⁴ The prosecutor, it is true, was a brickmaker, and examined the soil of the field; but the charge is that false and fraudulent representations were made to him of specific matters of fact which would be material in influencing his judgment, and, if that were so, the indictment would be sustained.

The jury, after a long consideration, said that they found the

² See, also, *Reg. v. Roebuck*, Dears. & B. 24 (1855); *Reg. v. Ross Bell*, C. C. 208 (1860); *State v. Tomlin*, 29 N. J. Law, 13 (1860); *State v. Burke*, 108 N. C. 750, 12 S. E. 1000 (1891).

³ The indictment is omitted.

⁴ See *Rex v. Dale*, 7 C. & P. 352 (1836); *Reg. v. Mills*, 7 Cox, C. C. 263 (1857).

pretenses false and fraudulent, but that the prosecutor was not influenced solely by means of the pretenses.

COCKBURN, C. J. That finding is not sufficient. Was he partly influenced by them? that is, did they materially affect his judgment?

The jury said they did. They turned the balance, so to speak, in his mind.

COCKBURN, C. J. Then that is sufficient to sustain the indictment, and a verdict must be entered of

Guilty.

PEOPLE v. BIRD.

(Supreme Court of Michigan, 1901. 126 Mich. 631, 86 N. W. 127.)

Theodore Bird, Theodore Williams, Jay Lawrence, and Charles Ray were convicted under an information charging conspiracy to defraud and false pretenses.¹

The second count is one for false pretenses, and sets forth the specific methods resorted to by the respondents to accomplish their object. The methods, in substance, were that the respondents represented to said Curtis that they were the apostles of Christ; that said Curtis and they were to be the judges of the people in that part of the country; that the son of Curtis was to be Christ in his second coming; that they (respondents) were sent by the Lord to tell Curtis these things; and that the Lord required of him to pay to them \$300, to make a home for them. The respondents were convicted.

GRANT, J. It is urged that the pretenses were so absurd and irrational that they do not come within the statute. This question has been adjudicated against the contention of the respondents in *People v. Summers*, 115 Mich. 537, 73 N. W. 818, where many authorities upon the point are cited. Mr. Curtis, from whom the respondents obtained the money, was evidently an ignorant and weak man. It appears from his own testimony and from other evidence that his mind is unbalanced upon the subject of religion. The statute is designed for the protection of such, and for the punishment of those who will take advantage of their weakness to perpetrate fraud.²

It is next urged that, though the respondents held peculiar views, yet that they were honest in their belief. We agree with counsel that their views were peculiar. Whether they were honest in them was a question for the jury.³ The court, in very clear language, instructed

¹ Part of this case is omitted.

² Accord: *Johnson v. State*, 36 Ark. 242 (1880); *Miller v. People*, 22 Colo. 530, 45 Pac. 408 (1896); *Cowen v. People*, 14 Ill. 348 (1853); *Lefler v. State*, 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424, 74 Am. St. Rep. 300 (1899); *State v. Fooks*, 65 Iowa. 196, 21 N. W. 561 (1884); *Smith v. State*, 55 Miss. 513 (1878); *Oxx v. State*, 59 N. J. Law, 99, 35 Atl. 646 (1896); *People v. Cole*, 65 Hun. 624, 20 N. Y. Supp. 505 (1892); *Watson v. State*, 16 Lea (Tenn.) 604 (1886).

³ Compare, *Penny v. Hanson*, 16 Cox, C. C. 173.

the jury that, if they were honest in their religious belief, no matter how misguided they might be, they could not be convicted. The evidence is that Bird and Williams were very active in preaching their doctrines to Mr. Curtis, that it was his duty to give them money, and that the Lord had so directed. We think, also, that there was evidence from which the jury might reasonably infer that respondents Lawrence and Ray were parties to the fraud, although they did not make direct representations to obtain the money.

We find no error in the record, and the conviction is affirmed.

The other justices concurred.

REGINA v. GARDNER.

(Court for Crown Cases Reserved, 1856. Dears. & B. 41.)

The evidence on the part of the prosecution, as far as is material for the purpose of this case, was that on the 13th day of November last the defendant, wearing the dress of a naval officer, engaged a lodging of Ellen Henrietta Brunsden (the prosecutrix) at the rate of 10 shillings per week; that on the 17th day of November the defendant expressed himself to prosecutrix as being comfortable, and that he should be likely to remain some time, and stated that he was paymaster of the Duke of Wellington, and his name was De Lancy; that the defendant continued a lodger till the 25th of November, and then expressed a wish to become a boarder, and an arrangement was accordingly entered into that he should become a boarder at a guinea a week; that the prosecutrix supplied the defendant with board, consisting of cooked meat, tea, sugar, bread, butter, cheese, and beer, for the six days following, but the defendant did not pay her anything for the lodging or board.¹

Ribton, for the prisoner. The conviction was wrong. It is important to observe the dates. When the false statement was made, neither money, chattel, nor valuable security was obtained by it; and obtaining lodging by a false pretense is not an offense within the statute. On the 25th November, when the contract to board was obtained, no false pretense was made.

COLERIDGE, J. Would it not be a question for the jury whether there was not a continuing false pretense?

Ribton. To obtain a contract by a false pretense is not within the act. It is not obtaining goods. Here, if anything besides the lodging was obtained by the false pretense, it was not food, but simply a new contract to supply board, and that would not be within the statute. The board might have been supplied, not in consequence of the false pretense made when the contract for the lodging was obtained, but in

¹ Part of this case is omitted.

consequence of the prisoner's manners and conduct after that time, and whilst he was a lodger.

COLERIDGE, J. Yes; but your point is that there was no evidence to go to the jury, even supposing the interval between the false pretense and the contract had only been an hour.

Ribton. It is quite clear that to obtain lodging alone would not be within the statute. Here the contract is for board and lodging united, and it is doubtful whether in any case obtaining board and lodging would be within the statute. It would always be difficult to separate the two, so as to show that the articles of food were obtained by means of the false pretense; but here, at all events, the evidence fails altogether to connect the obtaining of the food with the false pretense.

Horn, for the crown. It is indisputable law that the intervention of a contract is no answer to a charge of obtaining goods by false pretenses, if the contract be part of the fraud. Here the prisoner has obtained goods by means of his false pretenses, and the fact that the contract was to pay for the board and lodging together does not make it less an obtaining of goods.

JERVIS, C. J. The difficulty in the case of contracts is, where the party deceived gets not the consideration which he expects, but something like it.

Horn. In this case the false pretense is clearly proved. It was a continuing pretense, and the prosecutrix, acting upon it, was eventually induced to supply the prisoner with board, as well as lodging. It is objected that lodging is not within the statute. Land is not within the statute; but suppose, by a false pretense, I get an estate and a purse of gold? The articles of food which the prisoner obtained were chattels within the meaning of the statute; and the fact that the prisoner gained lodging as well as board cannot make any difference. The question whether the food was obtained by the false pretense was for the jury, and they have found that it was.

Ribton replied.

JERVIS, C. J. In this case, which was argued before us on Saturday last, the court took time to consider, principally with a view of first taking into consideration the cases of *Regina v Roebuck* and *Regina v. Burgon*, which have just been disposed of. It was an indictment for obtaining goods under false pretenses, the circumstances being that the prisoner represented himself to be the paymaster of the Duke of Wellington, of the name of De Lancy, upon which he made with the prosecutrix a contract for board and lodging at the rate of one guinea a week, and he was lodged and fed as the result of the contract, in consequence of the engagement so entered into upon that which was found to be a false pretense; and the question which was submitted to us was whether it was a false pretense within the statute, or, rather, whether the conviction was right? That we have considered, and on consideration we are of opinion that the conviction was not right, because we think that the supply of articles, as

it was said, upon the contract made by reason of the false pretense, was too remotely the result of the false pretense in this particular instance to become the subject of an indictment for obtaining those specified goods by false pretenses. We therefore think the conviction should be reversed.

Conviction quashed².

REGINA v. BUTTON.

(Court for Crown Cases Reserved, 1900. [1900] 2 Q. B. 597.)

Case stated by the Recorder of Lincoln.

The prisoner was charged with attempting to obtain goods by false pretenses.

On August 26, 1899, there were athletic sports at Lincoln, for which prizes were given. Among the contests were a 120-yard race and a 440-yard race, in respect of each of which a prize was given of the value of 10 guineas.

Among the names sent in for these two contests was the name of "Sims, C., Thames Ironworks A. C.," and two written forms of entry were sent in to the secretary of the sports, containing (as appeared to be usual) a statement as to the last four races in which Sims had run, together with a statement that he had never won a race. These forms were not sent by Sims, nor were they in his handwriting, and he knew nothing of them. They were, however, signed in his proper name and with his true address, and contained a correct account of his last four performances. The forms were proved to be not written by the prisoner.

The performances of Sims were very moderate, and, as a fact, he was only a moderate runner, and as a result the supposed Sims was given by the handicapper of the sports a start of 11 yards in the 120-yard race and a start of 33 yards in the 440-yard race.

Sims was ill at Erith when the races were run, and was not at Lincoln at all, and he was personated by the prisoner, who was a fine performer and won both contests very easily.

The suspicion of the handicapper being aroused, he asked the prisoner, after the 120-yard race, whether he was really Sims, whether the performance given in the entry form was really his, and whether he had never won a race. To these questions the prisoner answered that he was Sims, that the performances were his own, and that he had never won a race. All these statements were untrue, and in particular he had won a race at Erith in his own name. The handicapper was called as a witness, and swore that he would not have given the

² Accord: *Reg. v. Bryan*, 2 *Post.* & *F.* 567 (1862). Cf. *Reg. v. Martin*, L. R. 1 C. C. 56 (1867).

prisoner such favorable starts if he had known his true name and performances.

MATHEW, J. The conviction in this case must be upheld. The case of *Reg. v. Larner*, 14 Cox, C. C. 497, is relied upon as an authority for the defendant. In that case the question was one of fact, and the Common Serjeant directed the jury according to his impression of the view of the law taken by Stephen, J., whom, it appears from the report, he had consulted; but that case is contrary to the ruling of Lord Lindley in a case tried before him at the Nottingham Assizes (*Reg. v. Dickenson*, Roscoe's Criminal Evidence [12th Ed.] 432, 433, 2 Russell on Crimes [6th Ed.] p. 511, book 3, c. 32, § 2, Times of July 26, 1879), and I am clearly of opinion that Lord Lindley was right. The questions to be decided in the present case were pure questions of fact, namely, whether the intention of the defendant, when he entered for the races, was to obtain the prizes, and whether he made the representations with that intention. It appears from the case that he pretended to be a man who had never won a foot race, and he was handicapped on the faith of that statement, as is shown by the evidence given by the handicapper; but it also appears from the case that his statement was false, for he had won races. Then it was suggested that he competed in the name of Sims, as it is put in the case, "for a lark"; but that question was for the jury, and they have negatived the suggestion. It was also contended that his coming in first in the races was owing to his own good running; but it was also owing, in part at least, to the false pretenses, for by means of the false pretenses he obtained a longer start than he would have had, if his true name and performances had been known. It is also said that some other act had to be done in order to make the offense complete, and that he could not rightly be convicted, because it was not shown that he had applied for the prizes, and that the criminal intention was exhausted. The argument is exceedingly subtle, but unsound. In fact, he was found out before he had the opportunity of applying for the prizes, as no doubt he otherwise would have done. The pretenses which the prisoner made were not too remote, and the conviction was good.¹

Conviction affirmed.

PEOPLE v. WHITEMAN.

(Supreme Court of New York, 1902. 72 App. Div. 90, 76 N. Y. Supp. 211.)

LAUGHLIN, J. On the 15th day of November, 1900, the defendant was presented with a bill for \$35.45 for board and lodging at the Hotel Navarre, where he had previously registered under the name

¹ Argument of counsel and concurring opinion of Wright, J., are omitted. Lawrence, Kennedy, and Darling, JJ., concurred.

of John D. Wilson. He stepped up to the cashier's window and handed the bill to the cashier, together with a check for \$100, purporting to have been drawn by Arthur Dolan, Jr., on the Girard Trust Company of Philadelphia, dated that day, and payable to the order of John D. Wilson, and so indorsed. He made no express representation and was asked no question. The cashier delivered to him \$64.55, the difference between the face of the check and his bill. The check was in the due course of business forwarded to Philadelphia for collection, and returned marked "No account." The defendant remained at the hotel a couple of days after giving the check, but departed before it was returned dishonored. It was shown that no person by the name of Arthur Dolan, Jr., had had an account with the Girard Trust Company within three years. The cashier knew nothing of the defendant, except that he had registered at the hotel under the name of John D. Wilson. Upon these facts the defendant was arrested and subsequently indicted.

The indictment contains two counts, one charging grand larceny in the second degree, under section 528 of the Penal Code, in obtaining the money "by color or aid of fraudulent or false representation or pretense," with "intent to deprive or defraud" the proprietor of the hotel whose money was thus obtained, and the other charging grand larceny in the second degree, under section 529 of the Penal Code, in obtaining the money willfully and with intent to defraud the owner "by color or aid" of the check, knowing "that the drawer or maker thereof" was "not entitled to draw on the drawee for the sum specified therein, * * * although no express representation" was "made in reference thereto."

It was shown that the defendant, on being arrested and informed that the arrest was on a warrant "on a bad check in the Hotel Navarre," said to the officer on the way to the station house: "Now, we can straighten this matter out. I can get money and make good that check. You have no feeling against me, have you?" No other material evidence was introduced by the people, and the defendant did not take the stand.

There can be no doubt, we think, that the evidence is wholly insufficient to warrant a conviction under section 529 of the Penal Code. The evidence does not fairly justify the inference that the defendant willfully with intent to defraud obtained the money on the check with knowledge that Dolan was not entitled to draw against the Philadelphia bank for the amount thereof. The most that can be inferred from this evidence as tending to show a violation of the section lastly referred to is that defendant was known to Dolan by an assumed name, and that the check was made payable to his order under an assumed name, in which he indorsed it and obtained the money. This is not necessarily inconsistent with his innocence of the fact that Dolan did not have an account with the Girard Trust Company which was good for the amount of the check.

The question of the sufficiency of the evidence to hold the defendant under section 528 of the Penal Code for obtaining money "by color or aid of fraudulent or false representation or pretense," with intent to deprive the true owner thereof, is not so free from doubt. The jury were doubtless justified in finding from all the facts and circumstances that he deceived the cashier with reference to his true name, and that in obtaining the money he falsely represented or pretended that his true name was John D. Wilson. *People ex rel. Phelps v. Court of Oyer & Terminer*, 83 N. Y. 436, 453; *Fowler v. People*, 18 How. Prac. 493; *Kling v. Irving Nat. Bank*, 21 App. Div. 373, 47 N. Y. Supp. 528; *People v. Pinckney*, 67 Hun, 428, 22 N. Y. Supp. 118.

If the facts and circumstances were such as to indicate that the check would not have been cashed on his credit if it had been payable to his order by his true name, then probably his conviction would have been justified; but it does not appear that the cashier was led by the fictitious name to believe that he was another individual of financial responsibility. The credit was given to him, and he remained liable civilly. The cashier was in no manner misled, except as to the fact that he had registered under an assumed name. The false pretense or representation with regard to his true name is not what deprived the owner of his property. The check was cashed in the expectation that it was good and would be paid. Payment was not refused because of the fictitious name or indorsement of the payee, but solely because of the want of funds to the credit of the maker. The false pretense or representation, to constitute larceny, must have some bearing upon the question as to whether the check will be paid, or relate to the responsibility of the drawer or payee. There is nothing to show or indicate that, if he had registered in his true name and the check had been payable in that name, the credit would not have been extended; and, as he was unknown, it is manifest that the credit was given to the individual, and not on the strength of a name, which could have had no financial strength in such circumstances.

We think that the evidence is not sufficient to sustain his conviction. The rule is necessarily quite different with reference to the criminal liability in having a personal check cashed and in having a check payable to one's order cashed. In the former case he is presumed to know the condition of his own bank account; but where a person asks to have a check payable to his order cashed, while he guarantees payment, it is evident that he may not know whether the account of the drawer of the check is good, and he will not be liable criminally unless he makes some express material representation or knows that the check is not good. *People v. Moore*, 37 Hun, 84. Where neither the signature nor financial standing of the drawer or payee is known, there is no adequate protection afforded, either by the civil or criminal

law, to one paying such a check without inquiry and obtaining satisfactory representations.

In the case at bar the people have failed to introduce evidence which tends to establish the guilt of the defendant beyond a reasonable doubt. The facts and circumstances are extremely suspicious, but they do not necessarily point to the guilt of the defendant and are not inconsistent with his innocence; and the conviction, therefore, cannot stand. *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846.

The judgment should be reversed and a new trial granted.

VAN BRUNT, P. J., and PATTERSON, O'BRIEN, and McLAUGHLIN, JJ., concurred.

SECTION 6.—THE INTENT.

REX v. WILLIAMS.

(Brecon Assizes, 1836. 7 Car. & P. 354.)

False pretenses.¹ It appeared that the prosecutor, Peter Williams, owed John Williams, the prisoner's master, a sum of money, of which John Williams could not procure payment, and that the prisoner, in order to secure to his master the means of paying himself, had gone to the prosecutor's wife, in her husband's absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away, and that thereupon the prosecutor's wife delivered the two sacks of malt to the prisoner, who carried them to his master. It further appeared that the pretense was false, and that the prisoner knew it to be false at the time he used it.

Chilton, for the prisoner, submitted that the prisoner must be acquitted, as he had no intent to defraud.

E. V. Williams, for the prosecution. As it has been proved that what the prisoner pretended was false, and that he knew it to be so, and that by means of such false pretense he obtained the goods, he has brought himself within the statute; for every one must be taken to have intended the natural consequences of his own act, and the natural consequence of the prisoner's act was to defraud Peter Williams.

COLERIDGE, J. (in summing up). Although *prima facie* every one must be taken to have intended the natural consequence of his own act, yet if, in this case, you are satisfied that the prisoner did not intend to defraud Peter Williams, but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not

¹ The indictment is omitted.

guilty. It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt. You must be satisfied that the prisoner at the time intended to defraud Peter Williams.

Verdict—Not guilty.²

REGINA v. STONE.

(Lewes Assizes, 1858. 1 Post. & F. 311.)

False pretenses. The indictment charged that the prisoner, being a member of a building society, obtained from the society the sum of £30 by means of a false pretense that he had completed two houses, which he had to erect before he was entitled to receive the money.

Ballantine, Serjt., in opening the case, stated that it would appear that the prisoner, by the rules, would have forfeited the houses in case they were not completed by the time he made the pretense, and that the certificate of a surveyor was necessary to be, and was in fact, obtained before the money could be received; and, this being so, the object of the false pretense might be to avoid the forfeiture. It appeared to him, therefore, that the charge was not sustainable, and he proposed to withdraw from the prosecution.

WILLES, J., assented.³

REGINA v. NAYLOR.

(Court of Criminal Appeal, 1865. 10 Cox, C. C. 149.)

Case reserved by Alfred Coxon, Deputy Recorder of the City of Chester.⁴

The jury found, in answer to the questions put by me, that the prisoner's statement that Moss wanted the carpets was false to his knowledge, that he made it to induce the prosecutrix to part with the carpets, that the prosecutrix was induced to part with the carpets by reason of such false pretense, and that the prisoner, at the time he made the pretense and obtained the carpets, intended to pay the prosecutrix the price of them when it should be in his power to do so.

Upon this finding the counsel for the prisoner contended that the jury had negatived the intention to defraud, and consequently that the prisoner was entitled to a verdict of not guilty.

I entertained some doubt upon the question, and therefore reserved it for the consideration of the Court of Crown Cases Reserved. I directed a verdict of guilty to be entered, but postponed judgment,

² Accord: *People v. Thomas*, 3 Hill (N. Y.) 169 (1842); *Commonwealth v. Henry*, 22 Pa. 253 (1853). Cf. *Reg. v. Hughes*, 1 Cox, C. C. 244 (1845).

³ See accord: *Rex v. Wakeling*, Russ. & Ry. 504 (1823).

⁴ The indictment and evidence are omitted.

and the prisoner was discharged upon recognizance of bail to appear and receive judgment.

The question for the consideration of the court is whether, upon the facts above stated and the finding of the jury, a verdict of guilty or a verdict of not guilty ought to have been entered.

No counsel appeared on either side.

POLLOCK, C. B. We are all of opinion that this conviction must be affirmed.

Conviction affirmed.

CHAPTER XVI.

RECEIVING STOLEN PROPERTY.

At common law no receivers were accessories but such as received or harbored the thief himself; the receiving of the stolen goods only did not make a man accessory, without taking a reward to favor the felon's escape. If the owner received back his goods simply and without any agreement to favor the felon in his prosecution, it was lawful; but if he received them upon an agreement not to prosecute, or to prosecute faintly, it was called theftbote, and punishable by imprisonment and ransom. But now by St. 3 W. & M. c. 9, § 4, "if any person or persons shall buy or receive any goods or chattels that shall be feloniously taken or stolen from any other person knowing the same to be stolen, he or they shall be taken and deemed an accessory or accessories to such felony after the fact, and shall incur the same punishment as an accessory, etc., after the felony committed. * * *" Now, by St. 22 Geo. III, c. 58, it is enacted "that in all cases whatsoever, where any goods or chattels * * * shall have been feloniously taken or stolen, whether the offense of the principal shall amount to grand larceny or some greater offense, or to petit larceny only, * * * every person who shall buy or receive any such goods and chattels, knowing the same to have been so taken or stolen,¹ shall be deemed guilty of and may be prosecuted for a misdemeanor. * * *"

2 East, P. C. c. 16.

SECTION 1.—THE SUBJECT OF THE CRIME.

REX v. COWELL.

(Suffolk Assizes, 1796. 2 East, P. C. 617.)

Cowell and Green were convicted upon an indictment charging that Cowell feloniously stole one live ewe sheep, the goods, etc., of J. L., and that Green received "twenty pounds of mutton, part of the goods, etc., so as aforesaid feloniously stolen, etc., knowing the same to have

¹ St. 24 & 25 Vict. c. 96, has: "Knowing the same to have been feloniously stolen, taken, *extorted*, *obtained*, *embezzled*, or *disposed of*."

been stolen." On a question referred to the judges, whether the indictment were sufficient against the accessory, they all held the conviction proper.¹

REX v. DYER.

(Exeter Assizes, 1801. 2 East, P. C. 767.)

Dyer and Disting were indicted for stealing a quantity of barilla, the property of M. Hawker. The fact appeared to be that the barilla was on board a Swedish ship at Plymouth consigned to Hawker; that Hawker employed Dyer, who was master of a large boat, for the purpose of bringing the barilla on shore; and Disting, together with several others, were employed as laborers in removing the barilla after it was landed to Hawker's warehouses. The jury found that, while the barilla was in Dyer's boat, some of his servants, without his privity, consent, or participation, severed some of the barilla from the rest where it was stowed, and removed it to another part of the boat, where they concealed it under some rope. But they also found that Dyer afterwards assisted the other prisoner and the persons on board, who had before separated this part from the rest, in removing it from the boat for the purpose of carrying it off.

It was objected for the prisoner Dyer that his offense was not that of a principal, as laid in the indictment, but that of receiver or accessory after the fact. But GRAHAM, B., before whom the trial was had, thought that so long as the barrilla remained in the boat the offense as to Dyer could not be said to be complete, but that it was one continuing transaction to the time of the complete carrying off of it from the boat, and he directed the jury accordingly, who found the fact specially as above stated, and that both the prisoners were guilty. GRAHAM, B., however, deferred passing sentence till the next day, when he said that after consultation with the other judge (Mr. Justice LE BLANC) he was now fully satisfied that his opinion was well founded; that though for some purposes, as with respect to those concerned in the actual taking and separation, the offense would have been complete, as being an asportation in point of law, yet with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat, where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit; and Dyer, having assisted in the act of carrying it off, was therefore guilty as principal.

¹ See Accord: *Commonwealth v. White*, 123 Mass. 430, 25 Am. Rep. 116 (1877).

REGINA v. GRUNCELL.

(Central Criminal Court, 1839. 9 Car. & P. 365.)

The prisoner Gruncell was indicted for stealing a quantity of hay, the property of his master, and the prisoner Hopkinson with receiving it, well knowing it to have been stolen.

It appeared that the prisoner Gruncell, who was a carter, and was allowed by his master a small quantity of hay for the use of the horses on their journey to and from London, on the day mentioned in the indictment, took from his master's stables two trusses of hay above the quantity which was allowed for the horses, and that the prisoner Hopkinson, who was the hostler at a public house where the wagon stopped on the journey, came to the tail of the wagon and received the two trusses of hay from the other prisoner, and carried them from the wagon to the stable.

Adolphus submitted that the indictment was wrongly framed as to the prisoner Hopkinson in charging him with being a receiver, because, if he had committed any offense at all, it was that of stealing, as the hay, being in the master's wagon, was in the master's possession in point of law, and the act of the prisoner in removing it from the wagon constituted it a larceny, and not a receiving.

MIREHOUSE, C. S., was of opinion that the indictment was properly framed, but said he would consult Mr. Baron PARKE, who was in the adjoining court. He accordingly did so, and on his return said: "The learned judge has gone very carefully, with me and Mr. Clark, through the cases on the subject, and he is clearly of the opinion, with me, that the indictment is properly framed; and he is so on this ground: That, as the hay was not hay appropriated by the master for the horses, the moment it got into the cart *animo furandi*, the larceny was complete. If it had been hay allowed for the horses which had been stolen, it would have been otherwise.

Verdict—Guilty.

REGINA v. SCHMIDT.

(Court for Crown Cases Reserved, 1866. 10 Cox, C. C. 172.)

Case reserved for the opinion of this Court by the Deputy Chairman of the Quarter Sessions for the Western Division of the County of Sussex.

John Daniels, John Scott, John Townsend, and Henry White were indicted for having stolen a carpet bag and divers other articles, the property of the London, Brighton & South Coast Railway Company, and the prisoner, Fanny Schmidt, for having feloniously received a portion of the same articles, well knowing the same to have been stolen.

The evidence adduced before me as Deputy Chairman of the Court of Quarter Sessions at Chichester, for the Western Division of the County of Sussex, on the 20th of October, 1865, so far as relates to the question I have to submit to the Court of Criminal Appeals, was as follows:

On the 29th of July, 1865, two passengers by the prosecutors' line of railway left a quantity of luggage at the Arundel Station, which luggage was shortly afterwards stolen therefrom.

On the 30th of July a bundle containing a portion of the stolen property was taken to the Angmering Station, on the same line of railway, by the prisoner Townsend, and forwarded by him to the female prisoner, addressed, "Mr. F. Schmidt, Waterloo Street, Hove, Brighton." The bundle was transmitted to Brighton, in the usual course, on Sunday morning, the 30th.

Meanwhile the theft had been discovered, and shortly after the bundle had reached the Brighton Station a policeman (Carpenter) attached to the railway company opened it, and, having satisfied himself that it contained a portion of the property stolen from the Arundel Station, tied it up again, and directed a porter (Dunstall), in whose charge it was, not to part with it without further orders.

About 8 p. m. of the same day (Sunday, 30th) the prisoner, John Scott, went to the station at Brighton and asked the porter (Dunstall) if he had got a parcel from the Angmering Station in the name of "Schmidt, Waterloo Street." Dunstall replied, "No." Scott then said: "It is wrapped up in a silk handkerchief, and is directed wrong. It ought to have been directed to 22 Cross street, Waterloo street." Dunstall in his evidence added: "I knew the parcel was at the station; but I did not say so, because I had received particular orders about it."

The four male prisoners were apprehended the same evening in Brighton on the charge, for which they were tried before me and convicted.

On Monday morning, the 31st of July, the porter (Dunstall), by the direction of the policeman (Carpenter), took the bundle to the house No. 22 Cross street, Waterloo street, occupied as a lodging house and beer house by the female prisoner and her husband (who was not at home, or did not appear), and asked if her name was Schmidt, on ascertaining which he left the bundle with her and went away. Carpenter and another policeman then went to the house, found the bundle unopened, and took the prisoner to the Town Hall.

All the prisoners were found guilty, and I sentenced each of them to six months' imprisonment with hard labor. They are now in Petworth gaol in pursuance of that sentence.

At the request of the counsel for the female prisoner I consented to reserve for the opinion of this court the question:

Whether the goods alleged to have been received by her had not, under the circumstances stated, lost their character of stolen property,

so that she ought not to have been convicted of receiving them with a guilty knowledge within the statute?

HASLER HOLLIST.

Pearce (Willoughby with him), for the prisoner. The conviction is wrong. To support a conviction for receiving stolen goods, it must appear that the receipt was without the owner's authority. In this case, in consequence of the conduct of the railway company, the property had lost its character of stolen property at the time it was delivered at the receiver's house by the railway porter. The property is laid in the indictment as the property of the railway company, and Carpenter was not an ordinary policeman, but, as the case states, a policeman attached to the railway company. He opens the bundle, and finding therein some of the stolen property, he gives it to Dunstall, and orders it to be detained until further orders, and in the meantime the thieves were arrested. Carpenter then directs Dunstall to take the bundle to the receiver's house, so that the receiver got the stolen property from the railway company, who alone on this indictment are to be regarded as the owners of the property. The railway company, the owners, having got their property back, make what must be considered a voluntary delivery of it to the receiver. The case is similar to *Reg. v. Dolan*, 6 Cox, C. C. 449, 1 Dears. C. C. 436, where, stolen goods being found in the pockets of the thief by the owner, who sent for a policeman, and then, to trap the receiver, the goods were given to the thief to take them to the receiver's, which he did, and the receiver was afterwards arrested, it was held that the receiver was not guilty of feloniously receiving stolen goods, inasmuch as they were delivered to him under the authority of the owner. In that case *Reg. v. Lyons*, Car. & M. 217, was expressly overruled. Lord Campbell, C. J., said, in *Reg. v. Dolan*: "If an article once stolen has been restored to the owner, and he, having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the act of Parliament?"

Hurst, for the prosecution. Unless this case is distinguishable from *Reg. v. Dolan*, the conviction, it must be conceded, is wrong. But the facts of this case are more like the view taken by CRESSWELL, J., in *Reg. v. Dolan*: "That, while the goods were in the hands of the policeman, they were in the custody of the law; and the owner could not have demanded them from the policeman, or maintained trover for them." In that case the real owner intervened, and had manual possession of the stolen goods; here he does not. The goods belonged to the railway passenger, and the company are only bailees. [MELLOR, J. The policeman merely opened the bundle in the course of its transit, to see what was in it, and then sent it according to its direction. It was in the hands of the policeman, not of the company. ERLE, C. J. Suppose a laborer steals wheat, and he sends it by a boy to his accomplice, and the policeman stops the boy, ascertains what he has got,

then tells him to go on, then follows and apprehends the accomplice, is not the accomplice guilty of feloniously receiving? MELLOR, J. Here the policeman does nothing to alter the destination of the bundle. The element of the real owner dealing with the stolen property is wanting in this case. KEATING, J. Scott directs the address to be changed.] The bundle was sent by the thieves, through the railway company, to the receivers. The real owner had nothing to do with this part of the transaction. [LUSH, J. If the true owner had sued the company for the property, the company could not have justified detaining or converting it.] If a policeman knows of stolen goods being in the hands of an innocent agent, and does not take possession for the owner, and the innocent agent, by the policeman's directions, delivers them to a receiver, that does not prevent the receiver being guilty of feloniously receiving.

Pearce, in reply. Before the bundle was sent out for delivery the thieves were in custody, and, having secured them, Carpenter then gives orders for the bundle to be delivered to the receiver. Carpenter was the servant of the railway company, who are the owners for the purpose of this indictment, and the delivery, therefore, was by the owners.

[ERLE, C. J., and MELLOR, J., were of opinion that the conviction was right; but MARTIN, B., and KEATING and LUSH, JJ., held the conviction wrong. In consequence of the prisoner having suffered half the term of imprisonment from inability to get bail and the further unavoidable delay, the case was not sent to be argued before all the judges.]

ERLE, C. J. I am of opinion that the conviction was right. The question is whether, at the time this stolen property was received by the prisoner, it was the property of the London & Brighton Railway Company, and, if so, whether, when the policeman, Carpenter, caused the delivery to be stopped for the purpose of detecting the parties implicated, it thereby lost the character of stolen property. If it had lost the character of stolen property at the time it was received by the prisoner, the receiving by her will not amount to felony. But in this case I think that the railway company, when they took this bundle into their possession, were acting as bailees of the thief, and were innocent agents in forwarding it to the receiver, and that the things did not lose their character of stolen property by what was done by the policeman.

KEATING, J. I agree with my Brother MARTIN that the conviction was wrong. It seems conceded, on the authority of Dolan's Case, that, if the property had got back again for any time into the hands of the true owner, the conviction would be wrong. It is said that in this case the owners mentioned in the indictment, the railway company, were not the real owners, whereas in Dolan's Case the real owner intervened. But I think there is no distinction in principle between this case and that. The railway company are alleged in the indictment to be the owners of the property, and we, sitting here, can recognize no other persons than them. They are the owners from whom

the property was stolen, and it got back to their possession before it was received by the prisoner. I can see no real distinction between this case and *Dolan's*. All the reasons given for the judgment in that case apply equally to the case of the ownership in this case. The principle I take to be that, when once the party having the right of control of the property that is stolen gets that control, the transaction is at an end, and there can be no felonious receipt afterwards. I think the test put my Brother LUSH in the course of the argument, as to the real owner suing the railway company for the property after they had got the control of it, is decisive of the matter.¹

Conviction quashed.²

REGINA v. STREETER.

(Court for Crown Cases Reserved, 1900. [1900] 2 Q. B. 601.)

Case stated by the chairman of the West Sussex Quarter Sessions.

Ellen Tickner and William Streeter were tried for larceny in a dwelling house of some household goods, a sewing machine, and £27 in money. A count for receiving, in the usual form, was added to the indictment.

It appeared from the evidence that the defendant Ellen Tickner was living with her husband, James Tickner, to whom she had been married 26 or 27 years, at Stammerham, near Horsham. The defendant William Streeter was lodging with them.

On April 21, 1900, James Tickner turned Streeter out of the house. On May 11th Ellen Tickner packed, and sent by the carrier to Horsham, two boxes labeled "Streeter, Passenger to Brighton," which the carrier handed to Streeter at Horsham Station. Ellen Tickner shortly afterwards left her husband's house, while he was at work, and joined Streeter at Southwater Station, on the line to Brighton. They were subsequently found living together as man and wife at Farnham. James Tickner, after his wife's disappearance, missed the money and goods referred to in the indictment, and gave information to the police, which led to the arrest of the prisoners. At the time of the arrest the missing goods were found in the boxes which Ellen Tickner had sent to Streeter, and £27 in money was found in Streeter's box, the key of which was found in Ellen Tickner's purse.³

The question for the decision of the court was whether, upon the facts set out above, Streeter could be indicted for receiving goods stolen by Ellen Tickner from her husband.

MATTHEW, J. The conviction in this case must be quashed. The

¹ The opinions of Martin, B., and Mellor and Lush, JJ., are omitted.

² Accord: *U. S. v. De Bare*, 6 Biss. (U. S.) 358, Fed. Cas. No. 14,935 (1875); *Reg. v. Hancock*, 14 Cox, C. C. 119 (1878); *Reg. v. Villensky*, [1892] 2 Q. B. 597 (1892).

³ Part of the statement is omitted.

point is really concluded by the decision in *Reg. v. Smith*, L. R. 1 C. C. 266. Formerly there were two cases in which an indictment for larceny could not be preferred. The first case was that of a wife taking the goods of her husband, and the second was that of a partner taking the goods of the partnership. Both these cases have been brought within the criminal law by act of Parliament—the case of a partner by the larceny act of 1868 (St. 31 & 32 Vict. c. 116), and that of a wife by the married women's property act of 1882 (St. 45 & 46 Vict. c. 75, §§ 12, 16). The question which we have to determine is whether the present case comes within the terms of the larceny act of 1861 (St. 24 & 25 Vict. c. 96, § 91), so as to render the male prisoner liable to be convicted of receiving. The material words of that section are as follows: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this act, knowing the same to have been feloniously stolen * * * shall be guilty of felony." Here the act of the woman in taking her husband's property, which would not have been a felony either at common law or by virtue of the larceny act of 1861, has been made a criminal offense by another act, the married women's property act of 1882 (sections 12 and 16); but this does not bring it within the words "either at common law or by virtue of this act"—that is, the larceny act of 1861. *Reg. v. Smith*, 1839, 2 Moo. C. C. 101, 9 C. & P. 289, was a case in which partnership property had been stolen by a partner and received by the prisoner, the stealing being a criminal offense by virtue of the larceny act of 1868, and it was held that the prisoner could not be convicted of receiving under Larceny Act 1861, § 91. Our decision must be to the same effect; that is, that the prisoner cannot be convicted of receiving property stolen by a wife from her husband.

LAWRENCE, J., concurred.

WRIGHT, J. I agree that this prisoner could not properly be convicted under Larceny Act 1861, § 91; but in future cases it seems that there might be an indictment for receiving at common law.

KENNEDY and DARLING, JJ., concurred.

Conviction quashed.

SECTION 2.—THE ACT OF RECEIVING.

REGINA v. WILEY.

(Court for Crown Cases Reserved, 1850. 1 Eng. Law & Eq. 567.)

MARTIN, B.¹ It appears that two men stole some fowls, put them into a sack, and brought them into the house of Wiley's father, for the purpose of selling them to Wiley; that they all three went out of the house into the stable, the thieves carrying the sack and Wiley preceding them with a candle; that the stable door was shut; and that the policeman, on opening it, found the sack on the ground and three men standing round it, as if bargaining. Upon this case I am of opinion that Wiley never did receive these articles. I entirely agree that the question arises upon the possession. There was no property in these fowls, or in any of them. The men who stole the fowls had them in their possession, and intended to hold them hostilely to Wiley, and never intended to let him have them, unless some bargain were made between themselves and Wiley for the purchase of them. I think that, in the ordinary acceptance of the word "receive," Wiley could not be said to have received this property, and that, therefore, he ought not to have been convicted.²

ERLE, J. I am of opinion that the conviction is right, and on two grounds. The first ground is because Wiley co-operated with the thieves in removing the goods into the stable, which was under Wiley's control, for the purpose of more securely effecting a bargain respecting them. Now, if Wiley had taken part in the actual carrying of the goods, there would have been no doubt, I believe, in the minds of many of my Brothers but that he would have been rightly convicted. But he lighted a candle, and preceded the thieves, while they carried the sack; and I think that in so doing he co-operated with them, so as to render himself liable to be convicted as a receiver. I come to this conclusion on the principle of the law that a person who assists a thief in removing to a place of safety goods which the latter has already removed from the owner's premises cannot be convicted of larceny; but it seems to me that the person who so co-operates is a criminal, and that the law would reach him as a receiver. The other ground on which I think that this conviction may be sustained is that I attach a wider meaning to the word "receive" than has been given to it by some of my Brothers. The rules respecting property which have relation to civil rights seem to me to have no application here. Several statutes have been passed to render an accessory after the fact

¹ The statement and the argument of counsel are omitted.

² Talfourd and Patteson, J.J., and Platt, Alderson, and Parke, BB., delivered concurring opinions, in which Maule, J., concurred.

more open to punishment than he was at common law. I think that the word "receive," with respect to stolen goods, should be construed with reference to the word "harbor," applied to the thief. If a man harbors the stolen goods, knowing them to be stolen, for the purpose of aiding the thief, he is liable under the statute as a receiver. If he is the owner of a stable, and authorizes thieves to deposit stolen property on the premises, he would be liable in like manner; and it seems to me that he is not the less liable because the thieves remain there also. If they bring the property there with his consent, he is, I think, guilty of receiving it. The earlier statutes did not contemplate that there must be any bargain or transfer of the goods to a man to constitute him a receiver. In St. 29 Geo. II, c. 30, it was made an offense to leave the window, door, or shutter of any premises open at night for the purpose of offering a thief a place of deposit for any stolen lead or other metal.

On both these grounds I am of opinion that the conviction is right.³

COLERIDGE, J.⁴ I think, also, that the conviction is wrong. In my opinion, "receiving" must import possession, actual or constructive. I cannot find either here. I think, therefore, that the conviction is wrong. It is of great importance that in the administration of the criminal law we should proceed upon broad principles of construction, intelligible to common understandings.

Conviction reversed.⁵

REGINA v. WOODWARD.

(Court of Criminal Appeal, 1862. 9 Cox, C. C. 95.)

Case reserved for the opinion of the Court of Criminal Appeal. At the Quarter Sessions of the Peace for the County of Wilts, held at Marlborough, on the 16th day of October, 1861, before me, Sir John Wither Awdry, Bart., and others, my fellows, Benjamin Woodward, of Trowbridge, in the county of Wilts, dealer, was found guilty of receiving stolen goods, knowing them to have been stolen, and was thereupon sentenced to nine calendar months' imprisonment with hard labor, and the prisoner now is undergoing his sentence.

The actual delivery of the stolen property was made by the prin-

³ Part of this opinion is omitted. Campbell, C. J., and Williams and Cresswell, JJ., delivered concurring opinions.

⁴ Part of this opinion is omitted.

⁵ Compare: *State v. Seovel*, 1 Mill, Const. (S. C.) 274 (1817); *State v. Stroud*, 95 N. C. 626 (1886). In *State v. St. Clair*, 17 Iowa, 149 (1864), the indictment being for concealing stolen property, Lowe, J., said: "It is not necessary that the evidence should show that he had physical possession of it himself and concealed it with his own hands. But if he was present, knew that it was stolen property, and saw it hid by another, and kept silent, and refused to give information to the officers searching for the same, such conduct, unexplained, makes him as guilty in law as the party whose hands actually secreted the goods."

cial felon to the prisoner's wife, in the absence of the prisoner, and she then paid 6d. on account; but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance.

Guilty knowledge was inferred from the general circumstances of the case.

It was objected that the guilty knowledge must exist at the time of receiving, and that when the wife received the goods the guilty knowledge could not have come to the prisoner.

The court overruled this objection, and directed the jury that until the subsequent meeting, when the act of the wife was adopted by the prisoner and the price agreed upon, the receipt was not so complete as to exclude the effect of the guilty knowledge.

If the court shall be of opinion that the circumstances before set forth are sufficient to support a conviction against the prisoner for the felonious receipt, the conviction is to stand confirmed; but if the court shall be of a contrary opinion, then the conviction is to be quashed.

J. W. AWDRY.¹

ERLE, C. J. The argument of the learned counsel for the prisoner has failed to convince me that the conviction was wrong. It appears that the thief brought to the premises of the prisoner the stolen goods and left them, and that sixpence was paid on account of them by the prisoner's wife; but there was nothing in the nature of a complete receipt of the goods until the thief found the husband, and agreed with him as to the amount, and was paid the balance. The receipt was complete from the time when the thief and the husband agreed. Till then the thief could have got the goods back again on payment of the sixpence. I am of opinion, therefore, that the conviction should be affirmed.²

WILDE, B. I read the case as showing that the wife received the goods on the part of the prisoner, her husband, and that act of hers was capable of being ratified on the part of the prisoner. If so, that makes the first act of receiving by the wife his act. In the case of *Reg. v. Dring and Wife*, the only statement was "that the husband adopted his wife's receipt," and the court thought the word "adopted" capable of meaning that the husband passively consented to what his wife had done, and on that ground quashed the conviction. But here the prisoner adopted his wife's receipt by settling and paying the amount agreed on for the stolen goods.

MELLOR, J., concurred.

Conviction affirmed.

¹ The argument of Broderick, for the prisoner, is omitted.

² The concurring opinions of Blackburn and Keating, JJ., are omitted.

SECTION 3.—THE GUILTY KNOWLEDGE.

FRANK v. STATE.

(Supreme Court of Mississippi, 1889. 67 Miss. 125, 6 South. 842.)

Appellant was indicted for receiving stolen goods, a lot of car brasses, knowing them to be stolen.¹

CAMPBELL, J., delivered the opinion of the court.

It is true, as held in *Sartorius v. State*, 24 Miss. 602, that it is not sufficient, to convict the prisoner of receiving goods knowing them to be stolen, to show that he stole them; but where circumstances warrant the conclusion that they were stolen by another, and they are traced to the possession of the defendant, under circumstances sufficient to make him believe they were stolen, this is sufficient to uphold a conviction. By knowing them to be stolen is not meant that the defendant should personally have witnessed the theft. If the transaction is such as to convince him, or as should do so, that the things were stolen, and he received them, he has knowledge to make him guilty.

The evidence justifies the verdict of the jury. We find no error in the instructions. The assumption in one of them that the goods were stolen by another than Frank, in view of the evidence, which made this indisputable, is not ground for complaint.

Affirmed.²

STATE v. CAVENESS.

(Supreme Court of North Carolina, 1878. 78 N. C. 484.)

Indictment for larceny, with a count for receiving, etc., tried at fall term, 1877, of Randolph superior court, before Buxton, J.

BYNUM, J. This case is before us on the appeal of the defendant from the refusal of the court below to give him a new trial for alleged errors which we will specify and dispose of in their order.³

A more serious question is whether it was not the duty of the court to have instructed the jury that there was no evidence to convict the defendant upon the second count. Assuming that all the material evidence is set out in the case, the sum of it is, touching the second count, that the property was stolen one night and found next morning in the defendant's stable; that he was not then at home, and, in point of fact, was in another county, 40 miles distant, and did not return un-

¹ Part of this case is omitted.

² Accord: *Reg. v. White*, 1 Fost. & F. 665 (1859); *Murio v. State*, 31 Tex. Cr. R. 210, 20 S. W. 356 (1892); *State v. Feuerhaken*, 96 Iowa, 299, 65 N. W. 299 (1895).

³ Part of the opinion only is printed.

til the second day after the occurrence. He certainly did not receive the property until his return, as there is no evidence of previous guilty knowledge or connivance. To be guilty, he must have known at the moment of receiving it that it had been stolen, and he must at that time have also received it with a felonious intent. There is no evidence that he had any knowledge then imparted to him of the circumstances under which the property was found upon his premises, communicating to him notice of the felony; and his subsequent open and notorious user, and both previous and subsequent claim of property as his own, are inconsistent with felonious intent at the time of receiving, which is necessary to constitute guilt upon the second count.

As, however the evidence is not fully stated, and neither the attention of the court nor counsel seems to have been directed to this infirmity in the case, we do not rest our decision granting a new trial upon this point, but upon the error of the court in respect of the seventh exception.

There is error.

Venire de novo.

SECTION 4.—THE INTENT.

REX v. DAVIS.

(Gloucester Assizes, 1833. 6 Car. & P. 177.)

The prisoners, who were father and daughter, the former being a pawnbroker at Cheltenham, were indicted as receivers on several indictments, which charged them with receiving sheets and various articles of linen, the property of Thomas Liddell. It appeared that the goods laid in the first indictment were found, together with many other goods of the prosecutor, at the house of the elder prisoner, marked with his mark.

GURNEY, B.¹ If the receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same.²

The prisoners were acquitted on the merits.

¹ Only so much of the case as relates to intent is printed.

² Accord: *State v. Rushing*, 69 N. C. 29, 12 Am. Rep. 641 (1873); *State v. Hodges*, 55 Md. 127 (1880).

"In order to constitute the crime created by the statute, the stolen property must be received feloniously, or with intent to secrete it from the owner, or in some other way to defraud him of such property. The intent must be criminal or unlawful; otherwise, no crime can be committed. It is the intent with which the property is received that constitutes the essence of the crime. If the intent is honest and meritorious, no crime can be committed." *Crippen, P. J.*, in *People v. Johnson*, 1 Parker, Cr. R. (N. Y.) 564 (1854). Accord: *State v. Sweeten*, 75 Mo. App. 127 (1898).

PEOPLE v. WILEY.

(Supreme Court of New York, 1842. 3 Hill, 194.)

COWEN, J.¹ The section under which the defendant was indicted is as follows: "Every person who shall buy or receive in any manner, upon any consideration, any personal property of any value whatsoever, that shall have been feloniously taken away or stolen from any other, knowing the same to have been stolen, shall, upon conviction, be punished," etc., 2 Rev. St. (2d Ed.) p. 567, pt. 4, c. 1, tit. 3, § 71.

In charging the jury, the court mentioned the owner of the goods coming to reclaim his stolen property, and his bona fide agents, as not within the purview of the statute. But I take it to be clear, on the other hand, that if, pursuant to an understanding between a stranger and a thief, the stranger invite an interview with the owner, and obtain and actually receive the goods for him, under the mere color of an agency, but really to make a profit out of the larceny, he is a receiver within the statute.

The broad ground was taken on the argument that the offense would not be within the statute of receivers, even though a reward should be taken from the thief himself.

In the case at bar the defendant had come to a knowledge of the larceny soon after its commission, and he appeared to have that sort of communication, and to exercise such a control in respect to the stolen goods, and to negotiate in such a way for their delivery, as to raise a strong belief that he had arranged with the thief to restore the goods as a method of profiting by the crime. He receiving and delivering the goods under such a corrupt arrangement, the pretense of acting as agent for the owner could not operate as a protection. He would be in truth acting for himself. His pretext of agency for the owners would be fraudulent and void, and to allow practices of this kind would be to sanction a mode of evading the statutes.

It seems to me that the charge of the court below when properly understood, so far as it relates to the merits, can hardly be considered as going beyond the distinction between a real and colorable agency—between the defendant affecting to receive the goods for the owner, but really receiving them for his own benefit. The only part of the charge on the merits which is questioned by the bill of exceptions respects the concluding transactions of Saturday, the 26th of June, when the agreement for the delivery of the goods was consummated. That at this time the defendant knew the goods to have been stolen there is no doubt; nor that he had known the same thing during the previous days of the week. Now, if he had all this time been treating for such a reward only as was insisted on by the thief before he would give up the goods, or for a fair compensation to himself, proposed and

¹ Only extracts from the opinion are printed.

allowed as such, for his trouble, or if he had required both, I do not understand the court below to have said that his receiving the goods and fulfilling such an engagement would have been criminal within the statute. But suppose that, with such full knowledge and so much negotiation and apparently honest intentions to benefit the owners, his secret intent on Saturday was to convert the reward, or most of it, to his own use—to make a commodity out of the felony at the expense of the owners—and that he received and restored the goods with that intent, and carried it out either by taking the whole reward or dividing with the thief; it seems to me we have in such a case the very mischief which the statute was mainly intended to remedy. That mischief was such a receipt of stolen goods, with knowledge, as, contrary to the owner's intent, should deprive him of them, or any part of them. This is the doctrine which I understand the court below to have held. They said, if he received the property on Saturday with the intent (such intent being unknown and unassented to by the owners or their agents) to appropriate the reward to himself or divide it with the thief, and did either, he was then guilty. I do not recite the charge literally, but such is the substance of that part to which the stress of the argument for the defendant was directed.

I would by no means be considered as admitting that any arrangement to obtain and restore stolen goods for a reward stipulated with the owner, and actually receiving them from the thief for that purpose, would stand clear of the statute.² It obviously would not, if the reward were to be received from the thief; and, if from the owner, it would be a crime within the statute under which Jonathan Wild was hung. In the most favorable view, it would in general be an act of high legal criminality; for it is commonly accompanied with a composition of felony. This, at least, is a crime from the imputation of which even the owner himself and his most innocent agents (if the word "innocent" be admissible) can hardly be considered clear in such a transaction.

This defendant was the factotum. The thief, considering him an adept, appeals to him as a confidential go-between; and he proposes to obtain and restore the goods—say, if you please, for a specific share of the stolen fund. This is acceded to, and he receives the goods. I can feel no doubt that such a man is within the statute, both as to the letter and spirit. He instructs his counsel to call this honesty. It is, indeed, the honesty of a thief-broker; and had he, in this sense, dealt honestly and fairly both with the agents and the thief, I think he was within the statute. It follows, then, that in speaking of Saturday's transaction the court put it with too great qualification. They might well have told the jury that, though the agents of the bank were in no way imposed upon by the defendant, yet he was guilty. It fol-

² Accord: Receiving to induce owner to give reward, *State v. Pardee*, 37 Ohio St. 63 (1881).

lows that, so far from charging too strongly against the defendant, they erred in his favor.

On the whole, I am of opinion that a new trial should be denied, that the record be remitted, and the oyer and terminer be advised to pass sentence.

Ordered accordingly.³

³ Compare *Aldrich v. People*, 101 Ill. 16 (1881).

CHAPTER XVII.

BURGLARY.

Let inquiry also be made of burglars. Such we hold to be all those who feloniously in time of peace break churches, or the houses of others, or the walls or gates of our cities or boroughs. Infants under age, and poor people, who through hunger enter the house of another for victuals under the value of twelve pence, are excepted, as are also idiots and madmen, and others, who are incapable of felony; and those who enter into any tenement, by way of seisin in respect of some right which they think they have, are not held to be burglars.

The punishment of such felons is death.¹

Britton (Nicholls' Trans.) 42.

A burglar (or the person that committeth burglary) is by the common law a felon, that in the night breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not. * * * As long as the daylight continues, whereby a man's countenance may be discerned, it is called day; and when darkness comes and daylight is past, so as by the light of day you cannot discern the countenance of a man, then it is called night. * * * This doth aggravate the offense, sith the night is the time wherein man is to rest, and wherein beasts run about seeking their prey.

Coke, 3 Inst. 63.

SECTION 1.—THE BREAKING.

REX v. HYAMS.

(Central Criminal Court, 1836. 7 Car. & P. 441.)

The prisoners were indicted for burglary in the dwelling house of Jane Hart.

It appeared from the evidence of the prosecutrix that she went out, leaving her window shut down, but not fastened, though she admitted that there was a hasp which could have been fastened to keep it down. The entry was effected by raising the window.

¹ "Housebreaking and arson * * * are botless." Laws of Cnut II, 64.

For the prisoners, it was objected that this was not sufficient evidence of a breaking, as the window was not fastened when it might have been, and that it was similar to that of pushing farther up a window left a little open, which had been held not to be a breaking.

Mr. Justice PARK and Mr. Justice COLERIDGE were of opinion that there was enough to constitute a breaking, and the prisoners were convicted.¹

PEOPLE v. DUPREE.

(Supreme Court of Michigan, 1893. 98 Mich. 26. 56 N. W. 1046.)

GRANT, J. The respondent was convicted of burglary under section 9132, How. St.²

The theory of the prosecution was that the respondent, when in the shop, either on the 6th or 7th of October (the court, in its charge referred to the date as Friday, October 7th), raised the window just enough to prevent the bolt from entering the slot, and there was evidence to sustain it. It is insisted that even if this was so, and the respondent raised the window on the following night, it did not establish the crime of burglary. We cannot agree with this contention. It is said in *Dennis v. People*, 27 Mich. 151:

"If an entry is effected by raising a trap-door, which is kept down merely by its own weight, or by raising a window kept in its place only by pulley weight, instead of its own, or by descending an open chimney, it is admitted to be enough to support the charge of breaking; and I am unable to see any substantial distinction between such cases and one where an entry is effected through a hanging window over a shop door, and which is only designed for light above, and for ventilation, and is down, and kept down by its own weight, and so firmly as to be opened only by the use of some force, and so situated as to make a ladder, or something of that kind, necessary to reach it for the purpose of passing through it."

We think the doctrine there enunciated covers the present case. If there had been no bolt, and respondent had raised the window and entered in the nighttime, under all the authorities, he would have been guilty of burglary. Upon what reason can it be said that his removal of the bolt, or his raising the window a fraction of an inch, in the daytime, changes the character of his offense? If the owner had failed

¹ Accord: Removing a plank placed to cover an opening. *Carter v. State*, 68 Ala. 96 (1880); lifting a hook with which a door is fastened, *Ferguson v. State*, 52 Neb. 432, 72 N. W. 590, 66 Am. St. Rep. 512 (1897); pushing open door held in place merely by the friction of door against the sill, *Sparks v. State*, 34 Tex. Cr. R. 86, 29 S. W. 264 (1895); *Barber v. State* (Tex. Cr. App.) 69 S. W. 515 (1902); removing props from a door, *Rose v. Commonwealth*, 40 S. W. 245, 19 Ky. Law Rep. 272 (1897); *State v. Powell*, 61 Kan. 81, 58 Pac. 968 (1899).

² Part of the opinion only is printed.

to see that the bolts were in place, or if something had been accidentally placed upon the window sill, which was of slight thickness, but sufficient to prevent the bolts from entering the slots, the raising of the window would have been a sufficient breaking to support the charge. *Rex v. Hyams*, 7 Car. & P. 441; *State v. Reid*, 20 Iowa, 421; *Lyons v. People*, 68 Ill. 280. How can the act be relieved of criminality by secretly fixing the window in the daytime so that the bolt or lock will not be effective, and thus render the perpetration of the crime more easy and certain? There is no reason in such a rule. In *Lyons v. People*, the door was left unlocked, and the court was requested to instruct the jury that, in order to constitute the crime, it must appear that the door was secured in the ordinary way. The Supreme Court, in determining the question, said:

"We are not aware of any authority which goes to the extent of these instructions. To hold that the carelessness of the owner in securing and guarding his property shall be a justification to the burglar or thief would leave communities very much to the mercy of this class of felons. It would in effect be a premium offered for their depredations, by the removal of the apprehension of punishment. Whether property is guarded or not, it is larceny in the thief who steals it. When a door is closed, it is burglary for any one with felonious intent to open it and enter the house in the nighttime without the owner's consent; and it makes no difference how many bolts and bars might have been used to secure it, but which were neglected."

The language of the court was perhaps too broad in stating that if the window was raised any distance, but was not sufficient to permit the defendant to enter, and he raised it further, it would be breaking in the meaning of the law;² but the entire evidence was to the effect that it was raised so little as not to attract the notice of the occupant. We therefore think that the jury could not have been misled by the language.

Judgment affirmed.³

REX v. BRICE.

(Court for Crown Cases Reserved, 1821. Russ. & R. 450.)

The prisoner was tried before Mr. Justice BURROUGH at the Lent Assizes for the County of Dorset, in the year 1821, for burglariously breaking and entering the dwelling house of George Smith in the night of the 2d of December, 1820, with intent feloniously to steal the goods and chattels of the said George Smith therein being.

It appeared, by the evidence of the wife of the prosecutor, that whilst

² A late case, *Claiborne v. State*, 113 Tenn. 261, 83 S. W. 352, 68 L. R. A. 859, 106 Am. St. Rep. 833 (1904), holds this to be a breaking.

³ Compare *Rex v. Smith*, Russ. & Ry. 417 (1820).

sitting in a room adjoining the shop (part of the dwelling house of her husband), in which were various goods, the stock of her husband's trade, she heard, about 12 at night, a noise in the shop; that she took a candle and went into the shop, and, perceiving some soot fall from the chimney, she looked up and saw a man lying across the chimney, just above the mantelpiece.

It appeared that the man had not otherwise been in the shop, and the chimney had no communication with any other room in the house.

An alarm was made, and a man, who proved to be the prisoner, was immediately seen to come out at the top of the chimney. He was pursued and immediately apprehended.

The prisoner was by trade a chimney sweeper, and had shortly before been employed by the prosecutor to sweep the chimney of the shop, and also that of the sitting room, being all the chimneys in the house.

The learned judge, not being satisfied that the evidence was sufficient to support the charge of breaking and entering into the dwelling house, he desired the jury to consider whether they were satisfied that the prisoner's intention was to steal goods in the shop, and if they thought so he advised them to find him guilty, and he informed them that he should reserve the other point for the opinion of the judges.

The jury found the prisoner guilty.

In Easter Term, 1821, the judges met and considered this case. Ten of the judges, viz., BEST, J., GARROW, B., PARK, J., BAYLEY, J., WOOD, B., GRAHAM, B., RICHARDS, C. B., DALLAS, C. J., and ABBOTT, L. C. J., held the conviction right. They were of opinion that the chimney was part of the dwelling house, that the getting in at the top was a breaking of the dwelling house; and that the prisoner, by lowering himself in the chimney, made an entry into the dwelling house. HORROLD, J., and BURROUGH, J., thought the prisoner could not be said to have broken and entered the dwelling until he was below the chimney piece.¹

REX v. LEWIS.

(Hereford Assizes, 1827. 2 Car. & P. 628.)

The prisoners were indicted for a burglary in the house of John Verry and stealing money, etc. The house had been secured on the night before, and the thieves entered through a cellar window. This window, which was boarded up, had in it a round aperture of considerable size, to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and by the assistance of the other he thus entered the house. The prisoners did not enlarge the aperture at all.

¹ Crawling through small hole under the sill is a breaking, *Knotts v. State* (Tex. Cr. App.) 32 S. W. 532 (1895). See, also, *Pressley v. State*, 111 Ala. 34, 20 South. 647 (1895).

Justice, for the prisoners, contended that this was an open window, and therefore it was no burglary to enter at it.

Curwood, contra, submitted that this aperture came within the same reasoning as the cases of burglary where the thief came down a chimney, because it was as much closed as the nature of it would admit.

VAUGHAN, B. Do you think that, if a person leaves a hole in the side of his house big enough for a man to walk in, a person entering at it with intent to steal goods would be guilty of a burglary? I think not, and I am of opinion that this is not a burglary.

The jury, under his Lordship's direction, acquitted the prisoners of the burglary.¹

LE MOTT'S CASE.

(Old Bailey, 16—. Kelyng, 42.)

At the Sessions I inquired of Le Mott's Case, which was adjudged in the time of the late troubles, and my Brother WYLD told me that the case was this: That thieves came with intent to rob him, and finding the door lockt up, pretending they came to speak with him, and thereupon a maid servant opened the door, and they came in and robbed him, and this being in the nighttime this was adjudged burglary and the persons hanged, for their intention being to rob, and getting the door open by a false pretense, this was in *fraudem legis*, and so they were guilty of burglary, though they did not actually break the house, for this was in law an actual breaking, being obtained by fraud to have the door opened, as if men pretend a warrant to a constable, and bring him along with them, and under that pretense rob the house, if it be in the night, this is burglary.²

¹ In *Marshall v. State*, 94 Ga. 589, 20 S. E. 432 (1894), it was held that entering a ginhouse through a hole made for the passage of a band used in operating the machinery, by pushing aside the band, was burglary.

² Accord: *Ducher v. State*, 18 Ohio, 308 (1849); *State v. Mordecai*, 68 N. C. 207 (1873); *Johnson v. Commonwealth*, 85 Pa. 54, 27 Am. Rep. 622 (1877); *Nicholls v. State*, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870 (1887). Cf. *State v. Henry*, 31 N. C. 463 (1849). Entry obtained by intimidation; *State v. Foster*, 129 N. C. 704, 40 S. E. 209 (1901).

Before St. 12 Anne, c. 7, it was doubtful whether, if the entry were without breaking, a breaking out in order to escape was burglary. This statute declared it to be burglary. See 2 East, P. C. 489. Similar statutes have been enacted in the United States. See Pen. Code N. Y., § 498. In the absence of statutory provisions, such breaking is held not to be burglary in *Adkinson v. State*, 5 Baxt. (Tenn.) 569, 30 Am. Rep. 69 (1875); *Brown v. State*, 55 Ala. 123, 28 Am. Rep. 693 (1876); *Rolland v. Commonwealth*, 82 Pa. 306, 22 Am. Rep. 758 (1876). Contra: *State v. Ward*, 43 Conn. 489, 21 Am. Rep. 665 (1876); *State v. Bee*, 29 S. C. 81, 6 S. E. 911 (1888).

SECTION 2.—THE ENTRY.

 REX v. DAVIS.

(Court for Crown Cases Reserved, 1823. Russ. & R. 499.)

The prisoner was tried at the Old Bailey Sessions, in January, 1823, before the Chief Baron Richards, for burglary in the dwelling house of Montague Levyson.

The prosecutor, Levyson, who dealt in watches and some jewelry, stated that on the 2d of January, about 6 o'clock in the evening, as he was standing in Pall Mall opposite his shop, he watched the prisoner, a little boy, standing by the window of the shop, which was part of the prosecutor's dwelling house, and presently observed the prisoner push his finger against a pane of the glass in the corner of the window. The glass fell inside by the force of his finger. The prosecutor added that, standing as he did in the street, he saw the forepart of the prisoner's finger on the shop side of the glass, and he instantly apprehended him.

The jury convicted the prisoner; but the learned judge, having some doubt whether this was an entry sufficient to make the offense a burglary, submitted the case to the consideration of the judges.

In Hilary Term, 1823, the case was taken into consideration by the judges, who held that there was a sufficient entry to constitute burglary.

 REGINA v. O'BRIEN.

(Central Criminal Court, 1850. 4 Cox, C. C. 400.)

The prisoner was indicted for burglary. Evidence was given that the prisoner had lifted up the sash of a window, and that for the purpose of doing so his hand was within the room of the dwelling house. There was no further proof of entry.

O'Brien, for the prisoner, contended that, if the hand was there for the mere purpose of opening the sash, there was no sufficient entry proved.

TALFOURD, J. We have been looking into the authorities, and it seems sufficient if the hand, or any part of the person, is within the house for any purpose.

PATTESON, J. Where an instrument is used, the law appears to be different. There the instrument must be within the premises, not only for the purpose of making an entry, but also for the purpose of effecting the contemplated felony, as where a hook is introduced for the purpose of taking away goods, or a pistol put in for the purpose of killing the inmates of the house, there the entry is sufficient; but, if the in-

strument is merely used for the purpose of making an entry, then the proof of the entry fails. We think there is sufficient evidence here, and the case must go to the jury.

Not guilty.

STATE v. CRAWFORD.

(Supreme Court of North Dakota, 1899. 8 N. D. 539, 80 N. W. 193, 46 L. R. A. 312, 73 Am. St. Rep. 772.)

John Crawford was indicted for burglary in the third degree and acquitted by direction of the court, and the state appeals.

WALLIN, J.¹ There is no conflict of evidence in the case, nor is there any dispute between counsel as to the facts. The evidence shows that at the time and place stated in the information there was a certain building used as a granary, in which there was stored in bins about 800 bushels of wheat, and that in the nighttime three holes were bored with a two-inch auger through the walls of the granary and into one of the wheat bins. The three holes were so connected together as to make one large opening through the walls, and into the wheat bin. It further appears that there was a depression in the mass of wheat directly over the aperture made by the auger, indicating that wheat had passed out of the bin through such aperture to the amount of several bushels, and, further, that some wheat was spilled on the ground directly under the opening through the wall of the granary. Other evidence tended to connect the defendant with the felonious asportation and sale of the grain. Upon this evidence the question is presented whether the state had made out a *prima facie* case when the evidence closed and the state rested its case.

Counsel most strenuously contends that inasmuch as the evidence shows that the grain was removed through the opening made with an auger, and not otherwise, it therefore appears affirmatively that the defendant did not and could not have gone into the building, and hence that the state failed to establish the essential element of an entry. We cannot accept this conclusion from the evidence. It is manifest that the auger, guided by the person who bored the holes, passed through the walls of the granary into the mass of wheat, therein, and also manifest that it was the auger operating within the building which set the law of gravitation in motion, and thereby enabled the man guiding the auger to remove the property from within the building to the outside. Using the auger for the double purpose of breaking and taking possession of the property within the building brings the case within the rule announced in the authorities hereafter cited.

The order directing an acquittal will be reversed upon the ground that it was error to hold that the evidence did not tend to establish an entry.

¹ Part of the opinion is omitted.

REX v. GRAY.

(Old Bailey, 1721. 1 Strange, 481.)

One of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape; and KING, C. J., ruled it to be burglary, and the defendant was convicted and transported.¹

STATE v. MOORE.

(Superior Court of Judicature of New Hampshire, 1841. 12 N. H. 42.)

Indictment for breaking and entering the house of Isaac Paddleford, at Lyman, in the nighttime, on the 19th day of November, 1840, with intent to steal, and stealing therefrom certain pieces of money.

It appeared in evidence that the prisoner went to the house, which is a public house, and asked for and obtained lodging for the night, and that he took the money from a box in the desk in the barroom in the course of the night.

The jury were instructed that upon this indictment the prisoner might be convicted of burglary, of entering in the nighttime and stealing, or of larceny; that if the door of the barroom were shut, and the prisoner left his own room in the nighttime, and opened the door of the barroom, or any other door in his way thereto, except his own door, and stole the money, he was guilty of burglary; but that if he left his own room in the night, and stole the money from the barroom, without opening any door on his way thereto, except his own door, he was guilty of entering in the nighttime and stealing. The jury found the prisoner guilty of entering in the nighttime and stealing.

GILCHRIST, J.² It is said that, as the prisoner was lawfully in the house, he cannot be convicted of the offense of entering in the nighttime with intent to steal.

An innkeeper, holding out his inn "as a place of accommodation for travelers, cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them." *Markham v. Brown*, 8 N. H. 528, 31 Am. Dec. 209. As he has authority to enter the house, so he may enter any of the common public rooms. *Markham v. Brown*. The barroom of an inn is, from universal custom, the most public room in the house; and whether a traveler may, without per-

¹ Accord: *Edmonds' Case*, Hutton, 20 (1617); *Rex v. Johnson*, 2 East, P. C. 488 (1786); *Rex v. Wenmouth*, 8 Cox, C. C. 348 (1860); *State v. Scripture*, 42 N. H. 485 (1861); *Rolland v. Commonwealth*, 85 Pa. 66, 27 Am. Rep. 626 (1877); *State v. Howard*, 64 S. C. 344, 42 S. E. 173, 58 L. R. A. 685, 92 Am. St. Rep. 804 (1902). Cf. *Reg. v. Davis*, 6 Cox, C. C. 369 (1854).

² Part of the opinion is omitted.

mission, enter any of the private rooms or not, he has clearly a right to enter the barroom.

"It is not a burglarious breaking and entry, if a guest at an inn open his own chamber door, and takes and carries away his host's goods, for he has a right to open his own door, and so not a burglarious breaking." 1 Hale, P. C. 553, 554.

If a burglary could not be committed because the party had a right to open his own door, notwithstanding the subsequent larceny, the same principle would seem to be applicable here, where the prisoner had a right to enter the house, and where, by parity of reasoning, his subsequent larceny would not make his original entry unlawful.

For these reasons, the judgment of the court is that the verdict be set aside and a

New trial granted.

SECTION 3.—THE PLACE.

ANONYMOUS.

(Court for Crown Cases Reserved, 1690. Fost. C. L. 108.)

At a meeting of the judges upon a special verdict in January, 1690, they were divided upon the question whether breaking open the door of a cupboard let into the wall of the house was burglary or not. Hale saith that such breaking is not burglary at common law.¹

RESOLUTION.

(King's Bench, 1593. Poph. 52.)

It was agreed by all the Justices and Barons of the Exchequer, upon an assembly made at Sergeant's Inn, after search made for the ancient precedents, and upon good deliberation taken: If a man have two houses, and inhabit sometimes in one, and sometimes in the other, if that house in which he doth not then inhabit be broken in the night, to the intent to steal the goods then being in the house, that this is burglary, though no person be then in the house. * * * And the breaking of a church in the night to steal the goods there is burglary, although no person be in it, because this is the place to keep the goods of the parish.² And in the same manner the house of every one is the proper place to preserve his goods, although no person be there.

¹ Accord: State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216 (1793).

² Coke gives as the reason: "Ecclesia est domus mansionalis omnipotentis Dei." 3 Inst. 64.

ANONYMOUS.

(Winchester Assizes, 1618. Hut. 33.)

At the assizes holden at Winchester in the last circuite, before the Lord Chief Baron TANFIELD (it being the third circuite which I went with him) it was a question, whether one which had a shop in the dwelling house of another, and he which had the shop worked therein in the day, but never lodged there, and yet he had a house out of the shop to the street, if this shop be broken in the night and divers goods stolen out thereof, if it be burglary. And the Lord Chief Baron and I resolved that it was no burglary, because that by the severance thereof by lease to him which had it as a shop, and his not inhabiting therein, it was not any mansion house or dwelling house, and ergo no burglary, but ordinary felony.

 REX v. GARLAND.

(Court for Crown Cases Reserved, 1776. 1 Leach [4th Ed.] 144.)

At the Gaol Delivery holden at the Castle of Taunton in and for the county of Somerset, on the 13th of March, 1776, before Mr. Baron EYRE and Mr. Baron HOTHAM, William Garland was indicted for burglariously breaking and entering the dwelling house of George Shore with intent to commit a felony.

The jury found the following verdict: "That the prisoner broke and entered in the nighttime an outhouse in the possession of George Shore, and occupied by him with his said dwelling house, and separated therefrom by an open passage eight feet wide, with intent to commit a felony. That the said outhouse is not connected with the said dwelling house by any fence inclosing both the said outhouse and dwelling house, but whether," etc.

This case was referred to the consideration of the judges; and in the Easter Term following they were unanimously of opinion that, from the manner in which the jury had found the facts, it was impossible to consider this outhouse as part of the dwelling house, for they should have found it parcel of the dwelling house if it were so; for the outhouse, being so separated from the dwelling house and not within the same curtilage or common fence, was not therefore protected by the bare fact of its being so occupied with it at the same time, and therefore, as the burglary was the only offense charged in the indictment, the prisoner must be acquitted.¹

¹ Domus mansionalis doth not only include the dwelling house, but also the outhouses that are parcel thereof, as barns, stables, cow houses, dairy houses, if they are parcel of the messuage, though they are not under the same roof, adjoining or contiguous to it. Co. P. C. 64; Dalton, 254; 1 Hale, 558. And it was agreed by all the judges in the time of L. C. J. Hyde, that

REX v. HARRIS.

(Old Bailey, 1795. 2 Leach [4th Ed.] 701.)

At the Old Bailey in October Session, 1795, John Harris was tried before the Recorder of London for burglariously breaking and entering the dwelling house of Henry William Dinsdale, on the 6th of October, and stealing therein a gold watch, value £10, the goods of the said William Dinsdale.

It appeared in evidence that Mr. Dinsdale had lately taken the house in Queen street, in Cheapside, but had never slept in it himself; but on the night of the burglary, and for six nights before, had procured two hairdressers, of the names of Thomas Nash and James Chamberlain, who resided at St. Ann's lane, near Maiden lane, in Wood street, but in no situation of servitude to the prosecutor, to sleep in this house for the purpose of taking care of the goods and merchandise belonging to Mr. Dinsdale, which were deposited in the house.

THE COURT was of opinion that as the prosecutor had only so far taken possession of the house as to deposit certain articles of his trade therein, but had neither slept in it himself, nor had any of his servants, it could not, in contemplation of law, be called his dwelling house.

The jury, therefore, under the direction of the court, found him guilty of the larceny only, but not guilty of stealing in a dwelling house, or of the burglary; and he was sentenced to transportation for seven years.

QUINN v. PEOPLE.

(Court of Appeals of New York, 1878. 71 N. Y. 561, 27 Am. Rep. 87.)

FOLGER, J.¹ The plaintiff in error was indicted of the crime of burglary in the first degree, under the section of the Revised Statutes defining that crime. 2 Rev. St. (1st Ed.) p. 668, pt. 4, c. 1, tit. 2, § 10, subd. 1. The crime, as there defined, consists in breaking into and entering in the nighttime, in the manner there specified, the dwelling house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence given upon the trial showed clearly enough the breaking and enter-

the breaking and entering, in the nighttime, a bake house, eight or nine yards distant from the dwelling house, and only a pale reaching between them, was burglary. *Castle's Case*, 1 Hale, 558. But if the outhouse be far remote from the dwelling house, so as not to be reasonably esteemed parcel thereof, as if it stand a bowshot off, and not within or near the curtilage of the chief house, it is not *domus mansionalis*, nor any part thereof. *Year Book*, 2 Edw. VI, Bro. Cor. 180, 1 Hale, 559. See, also, *Green's Case*, Old Bailey, February Session, 1789, before Mr. Baron Thompson and Mr. Justice Grose. Rep.

¹ Part of the opinion is omitted.

ing and the criminal intent. The questions mooted in this court are whether it is legally proper, in an indictment for burglary of a dwelling house, to aver the ownership of the building in a partnership, and whether the proof showed that the room entered was a dwelling house within the intent of the statute.

As to the second question: It is needed only to note that there was an internal communication between the two stores, in the lower stories of the buildings, but none between them and the upper rooms, in which one of the partners and other persons lived. The room into which the plaintiff in error broke was used for business purposes only, but it was within the same four outer walls, and under the same roof as the other rooms of the buildings. To pass from the rooms used for business purposes to the rooms used for living in, it was necessary to go out of doors into a yard fenced in, and from thence upstairs. The unlawful entering of the plaintiff in error was into one of the lower rooms used for trade, and into that only. The point made is that as there was no internal communication from that room to the rooms used for dwellings, and as that room was not necessary for the dwelling rooms, there was not a breaking into a dwelling house, and hence the act was not burglary in the first degree as defined by the Revised Statutes as cited above. In considering this point, I will first say, that the definition of the crime of burglary in the first degree, given by the Revised Statutes, does not, so far as this question is concerned, materially differ from the definition of the crime of burglary as given at common law, to wit, "a breaking and entering the mansion house of another in the night, with intent to commit some felony within the same. * * *" 2 Russ. on Cr. p. 1, § 785. It will, therefore, throw light upon this question to ascertain what buildings or rooms were, at common law, held to be dwelling houses or a part thereof, so as to be the subject of burglary; for, as far as the Revised Statutes as already cited are concerned, what was a dwelling house or a part thereof at common law must also be one under those statutes. Now, at common law, before the adoption of the Revised Statutes, it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or buildings were in the same inclosure, and were built close to and adjoining each other. Case of Gibson, Mutton & Wiggs, Leach's Cr. Cas. 320 (Case 165), recognized in *People v. Parker*, 4 Johns. 423. In the case from Leach, there was a shop built close to a dwelling house in which the prosecutor resided. There was no internal communication between them. No person slept in the shop. The only door to it was in the courtyard before the house and shop, which yard was inclosed by a brick wall, including them within it, with a gate in the wall serving for ingress to them. The breaking and entering was into the shop. Objection was taken that it could not be considered the dwelling house of the prosecutor, and the case was reserved for the consideration of the twelve judges. They

were all of the opinion that the shop was to be considered a part of the dwelling house, being within the same building and the same roof, though there was only one door to the shop, that from the outside, and that the prisoners had been duly convicted of burglary in a dwelling house. The case in Johnson's Reports, *supra*, is also significant, from the facts relied upon there to distinguish it from the case in Leach, *supra*. Those facts were that the shop entered, in which no one slept though on the same lot with the dwelling house, was 20 feet from it not inclosed by the same fence, nor connected by a fence, and both open to a street. The court said that they were not within the same curtilage, as there was no fence or yard inclosing both, so as to bring them within one inclosure. Therefore the case was within that of *The King v. Garland*, 1 Leach, Cr. Cas. 130 (or 171), Case 77. It has been urged, in the consideration of the case in hand, that though the common law did go farther than the cases above cited, and did deem all outhouses, when they were within the same inclosure as the dwelling house, a part of it, yet that they must, to be so held, be buildings or rooms the use of which subserved a domestic purpose, and were thus essential or convenient for the enjoyment of the dwelling house as such. Gibson's Case, *supra*, would alone dispose of that. The building there entered was not only of itself a shop for trade, but it was in the use and occupation of a person other than the owner of the dwelling house. The books have many cases to the same end. *Rex v. Gibbons & Kew*, Russ. & Ry. 442, the case of a shop; *Robertson's Case*, 4 City Hall Rec. 63, also a shop, with no internal communications with the dwelling house; *Rex v. Stock et al.*, Russ. & Ry. 185, a counting room of bankers; *Ex parte Vincent*, 26 Ala. 145, 62 Am. Dec. 714, one room in a house used as a wareroom for goods; *Rex v. Witt*, Ry. & M. 248, an office for business, below lodging rooms. Indeed, the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation. It is plain that both of these may arise when the place entered is in close contiguity with the place of the owner's repose, though the former has no relation to the latter by reason of domestic use or adaptation. Besides, the cases have disregarded the fact of domestic use, necessity, or convenience, and have found the criterion in the physical or legal severance of the two departments or buildings. *Rex v. Jenkins*, Russ. & Ry. 244; *Rex v. Westwood*, Id. 495, where the separation of the buildings was by a narrow way, both of them being used for the same family domestic purposes. It is not to be denied that there are some cases which do put just the difference above noted, as now urged for the plaintiff in error (*State v. Langford*, 12 N. C. 253; *State v. Jenkins*, 50 N. C. 430; *State v. Bryant Ginns*, 1 Nott & McC. [S. C.] 583), though, in the case last cited, it is conceded that if a store is entered, which is a part of a dwelling house, by being under the same roof, the crime is committed; and it

must be so, if it is the circumstance of midnight terror in breaking open a dwelling house which is a chief ingredient of the crime of burglary, and it is for that reason that barns and other outhouses, if in proximity to the mansion house, are deemed quasi dwelling houses, and entitled to the same protection (*State v. Brooks*, 4 Conn. 446-449). Coke, 3 Inst. 64, is cited to show that only those buildings or places which in their nature and recognized use are intended for the domestic comfort and convenience of the owner may be the subject of burglary at common law; but in the same book and at the same page the author also says: "But a shop wherein any person doth converse"—i. e., be employed or engaged with; Richardson's Dic. "in voce"—"being a parcel of a mansion house, or not parcel, is taken for a mansion house." So Hale is cited (1 P. C. 558); and it is there said that "to this day it is holden no burglary to break open such a shop." But what does he mean by that phrase? That appears from the authority which he cites, Hutton's Reps. 33, where it was held no burglary to break and enter a shop, held by one as a tenant in the house of another, in which the tenant worked by day, but neither he nor the owner slept by night. And the reason given is the one above noticed, and often recognized by the cases, that by the leasing there was a severance in law of the shop from the dwelling house. But Hale also (1 P. C. 557) cites as law the passage from the Institutes above quoted. Other citations from text-books are made by the plaintiff in error. They will be found to the same effect, and subject to the same distinction as those from Coke and Hale. And see *Rex v. Gibbons et al.*, *supra*; *Rex v. Richard Carroll*, 1 Leach, Cr. Cas. 272 (Case 115). That there must be a dwelling house, to which the shop, room, or other place entered belongs as a part, admits of no doubt. To this effect, and no more, are the cases cited by the plaintiff in error of *Rex v. Harris*, 2 Leach, 701, *Rex v. Davies*, alias *Silk*, Id. 876, and the like. There were cases which went further than anything I have asserted. They did not exact that the building entered should be close to or adjoining the dwelling house, but held the crime committed if the building entered was within the same fence or inclosure as the building slept in. And the dwelling house in which burglary might be committed was held formerly to include outhouses—such as warehouses, barns, stables, cow houses, dairy houses—though not under the same roof or joining contiguous to the house, provided they were parcel thereof. 1 Russ. on Cr. *799, and authorities cited. Any outhouse within the curtilage or same common fence with the dwelling house itself was considered to be parcel of it, on the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or homestall. *State v. Twitty*, 2 N. C. 102; *State v. Wilson*, Id. 242. See, also, *State v. Ginns*, 1 Nott & McC. (S. C.) 585, where this is conceded to be the common law. See note "a" to *Garland's Case*, *supra*.

It seems clear that at common law the shop which the plaintiff in error broke into would have been held a part of a dwelling house.

I am brought to the conclusion that upon the facts proven the plaintiff in error was properly indicted and convicted of the statutory crime of burglary in the first degree.

ALLEN, MILLER, and EARL, JJ., concur. RAPALLO and ANDREWS, JJ., dissent. CHURCH, C. J., not voting.

Judgment affirmed.

CHAPTER XVIII.

ARSON.

Let inquiry also be made of those who feloniously, in time of peace, have burnt others' corn or houses, and those who are attainted thereof shall be burnt, so that they may be punished in like manner as they have offended.

Britton (Nicholls' Trans.) 47.

It extendeth not only to the very dwelling house, but to all out-houses that are parcel thereof, though not contiguous to it, or under the same roof, as in case of burglary.

1 Hale, P. C. 567.

To a charge of arson one may say that the event was the outcome of mischance and not of forethought felony.

Mirror of Justices (Sel. Soc.) c. 17.

If A. shoot unlawfully, in a hand gun, suppose it to be at the cattle or poultry of B., and the fire thereof sets another's house on fire, this is not felony, for though the act he was doing were unlawful, yet he had no intention to burn the house thereby, against the opinion of Dalt. p. 270, c. 105. But if A. have a malicious intent to burn the house of B., and in setting fire to it burns the house of B. and C., or the house of B. escapes by some accident, and the fire takes in the house of C. and burneth it, though A. did not intend to burn the house of C., yet in law it shall be said the malicious and willful burning of the house of C., and he may be indicted for the malicious and willful burning of the house of C.

1 Hale, P. C. 569.

 REX v. HARRIS.

(King's Bench, 1753. Fost. C. L. 113.)

At Aylesbury, Lent Assizes, 1753, before Mr. Justice Denison. Elizabeth Harris, a girl of 14 years of age and of sufficient understanding for her years, was indicted for maliciously setting fire to and burning a dwelling house in the possession of Edward Stokes, and Anne, the wife of William Course, was indicted as an accessory to the felony before the fact.

The prisoner Elizabeth was the daughter of the prisoner Anne by a former husband, John Harris. It appeared in evidence at the trial that John Harris died seized of the equity of redemption of this house and of another adjoining to it, subject to a mortgage term for £20,

and that the equity descended to his eldest son, a child left with other children under the care of their mother, the prisoner Anne, who was entitled to dower out of these houses, but no dower was ever assigned; that Anne, having the care of her son and his estate, let these houses to Edward Stokes at the rent of £5 a year, and received the rent for some time, but, having a large family of children, she was obliged to ask relief of the parish where she lived; that she was denied such relief on account of these houses, the parishioners insisting that the overseers of the poor should be let into the receipt of the rent before she should be entitled to any parochial relief; that thereupon she frequently declared she would set the housing on fire if the parish did not relieve her; that she had young children whom the parish could not punish, though they might punish her, and she would order the least child she had who could carry a coal of fire to burn the housing down; and many other declarations of the like kind she made, which discovered an obstinate resolution in her to burn the houses rather than submit to the terms the parishioners insisted on.

It appeared further that the prisoner Elizabeth set the house on fire by the direction of the prisoner Anne, who went from home on purpose to be absent at the time the fact was committed, and that no other house was burnt.

The jury found both the prisoners guilty. But a doubt arising by reason of the interest the prisoner had in the house, Mr. Justice Denison thought proper to respite judgment in order to take the opinion of the judges on the case.

July 2, 1753. At a meeting of the judges at the Chief Justice's chambers it was unanimously agreed that both the prisoners are guilty of felony. The only doubt was with regard to the interest the prisoner Anne had in the house, and it was grounded on the reasoning in Holmes' Case; for had she had such estate in the house as would have cleared her of the charge of felony, the prisoner Elizabeth, who acted by her directions, could not have been guilty of felony.

But all the judges agreed that the prisoner Anne's title to dower was not such an interest as could bring her within the rule in Holmes' Case. Holmes had the possession by legal title, and during the continuance of his lease could maintain his possession against all mankind, and therefore the house might in a limited sense be called his own; but in the present case the possession was in Edward Stokes under a demise from Anne in behalf of her son, and subject to a yearly rent which she received. And her title to dower, had Edward Stokes' interest been out of the case, did not so much as give her a right of entry, it being a bare right of action.

Mr. Justice DENISON said that he had no doubt upon him from the beginning; but it being a new case, and some of the bar being doubtful, he thought it advisable to take the opinion of the judges.

At the next assizes judgment of death was pronounced upon both the prisoners, and Anne was executed; but Elizabeth, being young

and acting under her mother's direction, was reprieved and recommended to mercy on condition of transportation.

It was said in the debate of this case by some of the judges, and not denied by any, that had Anne been seised of the freehold and inheritance of the house, and Stokes in possession under a lease, it would have been felony in Anne to have burnt it; otherwise all tenants and their concerns would be very much at the mercy of their landlords.¹

The principle three of the judges went upon in Holmes' Case (for Croke did not concur in the judgment) doth seem to warrant this opinion. They considered the house then under consideration as the property of Holmes, as his own house, by reason of the estate he had in it under his lease. Croke did not dispute the principle, but argued against the conclusion the other judges drew from it; and, if this be so, I do not see why it may not with strict legal propriety be said of a reversioner, who should maliciously set fire to houses in the possession of his tenants under leases from himself or his ancestors, that he *ædes alienas combussit*.

REX v. GOWEN.

(King's Bench, 1786. 1 Leach [4th Ed.] 462, note.)

William Gowen was convicted before L. C. B. Skinner, of arson. The house he burned was rented by one Richard Dobney, named in the first count as the owner, and let by him from year to year to the parish officers of Laxfield, who paid the rent for it, and who were, at the time of burning the house, the persons named (individually) in the third count of the indictment. The prisoner was a parish pauper, and had been put into the house by the overseers to live there. He had the sole possession and occupation of it without paying any rent, and was resident therein with his family at the time the fact was committed, and on reference to the judges they all held that the prisoner had no interest in the house, but was merely a servant, and therefore it could not be said to be his house, but that the overseers had the possession of it by means of his occupation, and they accordingly held that he had been properly convicted.²

¹ See accord: *Sullivan v. State*, 5 Stew. & P. (Ala.) 175 (1834); *Erskine v. Commonwealth*, 8 Grat. (Va.) 624 (1851); *State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602 (1860); *Hannigan v. State*, 131 Ala. 29, 31 South. 89 (1901).

² Compare *Rex v. Wallis*, 1 Moody, 344 (1832).

REGINA v. RUSSELL.

(Berkshire Assizes, 1842. Car. & M. 541.)

Arson. The prisoner was indicted for maliciously setting fire to the house of Ann Wright, at Old Windsor.

On the part of the prosecution Miss Wright was called. She said: "The prisoner was in my service. Very early on the morning of the 4th of December, I perceived smoke and got up, and on my going down stairs I found a small fagot lighted and burning on the boarded floor of the kitchen, about four feet from the hearthstone. I took up the burning wood and put it into the grate. A part of the boards of the kitchen floor was scorched black, but not burnt. The fagot was nearly consumed, but no part of the wood of the floor was consumed.

CRESSWELL, J. The case of Regina v. Parker, 9 C. P. 45, 38 E. C. L. R. 29,¹ is the nearest to the present, but I think it is distinguishable.

Carrington, for the prisoner. I submit that the wood of the floor being scorched is not sufficient to constitute this offense, as wood may be scorched without being actually on fire.

CRESSWELL, J. I have conferred with my Brother PATTESON, and he concurs with me in thinking that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offense that wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all. The prisoner must be acquitted.

Verdict—Not guilty.

¹ In that case the wood of the floor was "charred in a trifling way, it had been at a red heat, but not in a blaze," and this was held a sufficient burning to support an indictment for arson.

CHAPTER XIX.

FORGERY.

Definition—The false making or alteration of any written instrument whereby another may be prejudiced, with intent to deceive and defraud. 2 East, P. C. 840.

SECTION 1.—THE INSTRUMENT.

REX v. WARD.

(King's Bench, 1726. 2 Str. 747.)

An information was exhibited in the name of the Attorney General, charging that Mr. Ward, existens onerabilis to deliver to the Duke of Bucks 315 tons and 1 quarter of alum ad certum diem jam præteritam, did, with intent to defraud him thereof, forge an indorsement on the back of a certificate in the words and figures following: "Mr. John Ward: I hereby order you to charge 660 tons and 1 quarter of alum to my account, part of the quantity here mentioned in this certificate, and for your so doing this shall be your discharge. Buckingham. April 30, 1706." The information likewise charges a publication of it knowing it to be forged. Upon not guilty pleaded, it was tried at the bar, and a verdict found for the king in Easter Term 12 Geo. The defendant absconded till the last day of Michaelmas Term, when he voluntarily came into court, and desired to be bailed; but the court refused it, and so he was committed.

And now in Hilary Term his counsel (Mr. Hungerford, Mr. Ketelbey, Mr. Filmer, Mr. Bootle, and Mr. Strange) took some objections in arrest of judgment, and what they principally relied upon were these:

1. That this is not such a paper of which a forgery could be committed at common law. This is laid as an offense at common law; and Hawkins in his Pleas of the Crown, 182. says that it must be a matter of record, or any other authentic matter of a public nature, as a deed or will. Other writings of an inferior nature, as forging the hand of an authority to receive rent, counterfeiting a letter made in another man's name, etc., are (says he) more properly punishable as cheats on St. 33 Hen. VIII, c. 1. In Cro. Eliz. 166, it is held not actionable to say, "You have falsely forged your father's hand, and there-

by falsely have procured your father's tenants to pay their rent to you," because it would not be forgery if he had done so. 1 Rolle, Abr. 66.¹

Mr. Attorney, Mr. Lee, Mr. Marsh, Mr. Fazakerley, and Mr. Verney, *e contra*, argued that this was a forgery at common law, and that it was the highest reflection upon the law to imagine there ever was a time wherein such a fact as this was not punishable by the law of England. As to the passage in Hawkins, it is not warranted by the authorities quoted in the margin, and he has laid it down much too large. Sti. 12, is an indictment at common law for forging letters of credit to raise money, and nobody imagined it did not lie; and there it is not laid that he actually received money upon it, which makes the case an answer to both exceptions. 5 Mod. 137; Salk. 342. Indictment for forging a bill of lading. 2 Sid. 142. Counterfeiting a protection from a member of Parliament. Salk. 406, Hil. 32 Car. II, rot. 35, Rex v. Sheldon, for forging a bill of exchange, Ray, 81. The like for forging a warrant of attorney. Mich. 6 Geo. Rex v. Ward (a brother of the defendant). Indictment for forging a promissory note, and laid at common law, and never imagined it was not an offense; and the defendant was convicted. 1 Sid. 71. 3 Leon. 170, is for forging the entry of a marriage. It could not be an indictment as a cheat on St. 33 Hen. VIII, because there must be an actual obtaining upon that statute.

PER CURIAM. As there is no judicial authority on either side, we must take it up upon the reason of the thing. There is no reason why this should not be punished as a forgery, as well as if it were a deed. The injury may be as great, or greater, for the value may be £100,000 in one case, and a deed perhaps affect only a single acre of land. St. 5 Eliz. shows this to be a crime, by using the word "writings," in contradistinction to deeds. It cannot be prosecuted as a cheat at common law, without an actual prejudice, and that is an obtaining on St. 33 Hen. VIII. The case cited out of Cro. is not law, and surely those words are actionable. Regina v. Travers was for forging an indorsement on an army debenture, and laid as at common law. The reason why we do not meet with ancient determinations is because personal credit was formerly small, and these writings not made use of. It is not necessary to show an actual prejudice, a possibility is enough; and here it appears there would have been one, if the forgery had stood. *Judicium pro rege*.

Afterwards he was sentenced to stand in the pillory before Westminster Hall gate (which he did), to pay £500 and find securities for seven years, and commitment till all was performed.

¹ Parts of the arguments of counsel are omitted.

REGINA v. SMITH.

(Court of Criminal Appeal, 1858. 8 Cox, C. C. 32.)

Case reserved and stated by the Recorder of London:

John Smith was tried before me at the Central Criminal Court, upon an indictment charging him with forging certain documents, and with uttering them, knowing them to be forged.

It appeared that the prosecutor, George Borwick, was in the habit of selling certain powders, some called "Borwick's baking powders," and others "Borwick's egg powders."

These powders were invariably sold in packets, and were wrapped up in printed papers.

The baking powders were wrapped in papers which contained the name of George Borwick, but they were so wrapped that the name was not visible till the packets were opened.

It was proved that the prisoner had endeavored to sell baking powders, but had them returned to him because they were not Borwick's powders.

Subsequently he went to a printer, and, representing his name to be Borwick, desired him to print 10,000 labels as nearly as possible like those used by Borwick, except that the name of Borwick was to be omitted in the baking powders.

The labels were printed according to his order, and a considerable quantity of the prisoner's powders were subsequently sold by him as Borwick's powders wrapped in those labels.

On the part of the prisoner it was objected that the making or uttering such documents did not constitute the offense charged in the indictment.

This point I determined to reserve for the consideration of the Court of Criminal Appeal, and I left it to the jury to find whether the labels so far resembled those used by Borwick as to deceive persons of ordinary observation, and to make them believe them to be Borwick's labels, and whether they were made and uttered by him with intent to defraud the different parties by so deceiving them, directing them in that case to find the prisoner guilty.

The jury found him guilty.¹

McIntyre, for the prisoner. This is not a forgery, either at common law or within the statute. The gist of the offense was the passing off for genuine baking powder that which was not so; in fact, something that was not so good. This was nothing more than a puff. In *Reg. v. Closs*, 27 L. J. 54, M. C., it was held that a person could not be indicted for forging or uttering the forged name of a painter, by falsely putting it on a spurious picture to pass it off as the genuine

¹ Part of the evidence is omitted.

painting of the artist. This was no more than a printed label, and only differs from *Reg. v. Closs* in that there the name was painted on the picture. In the case of Burgess' sauce labels the Court of Chancery refused to restrain the son from using labels with the father's name upon them. [POLLOCK, C. B. Suppose a man opened a shop and painted it so as exactly to resemble his neighbor's; would that be forgery?] No. The affixing this label to the powder amounts to no more than saying: "This is Borwick's powder." If the prisoner had had a license, he would have had a right to use the labels.

Huddleston (Poland with him), for the prosecution. The jury have found that the labels were made and uttered by the prisoner with intent to defraud. The definition of forgery at common law is "the fraudulent making or alteration of a writing to the prejudice of another man's right." 2 Russ. on Crimes, 318; 4 Black. Com. 247; Stark. Crim. Law, 468; 2 East, P. C. p. 965, c. 19, § 49. And the finding of the jury brings this case within that definition. [CHANNELL, B. What was a document at common law which could be the subject of a forgery? POLLOCK, C. B. Was a book of which another man made copies?] It is submitted that it was. Com. Dig. "Forgery." Letters may be the subject of forgery. Chit. Crim. Law, 1022. So a diploma of the College of Surgeons may be. *Reg. v. Hodgson*, 7 Cox, C. C. 122. So also the certificate of the examiners of the Trinity House. *Reg. v. Toshack*, 1 Den. C. C. 492. So a letter of the character of a servant may be. *Reg. v. Sharman*, 1 Dears. C. C. 285. Then this label is a certificate as to the character of an article. *Reg. v. Closs*, *R. v. Colicott*, *R. & R.* 201, and Stark. Crim. Law, 479, were also cited.

BRAMWELL, B. I think that this was not a forgery, even assuming that the definition of forgery at common law is large enough to comprehend this case. Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other. In the present case one of these documents is as good as the other, the one asserts what the other does, the one is as true as the other, but the one is improperly used. But the question now is whether the document itself is a false document. It is said that the one is so like one used by somebody else that it may mislead. That is not material, or whether one is a little more true or more false than the other. I cannot see any false character in the document. The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretenses, but I think he cannot be convicted of forgery.²

CHANNELL, B., concurred.

² Pollock, C. B., and Willes, J., delivered concurring opinions.

BYLES, J. Every forgery is a counterfeit. Here there was no counterfeit. The offense lies in the use of it.
Conviction quashed.³

WALL'S CASE.

(Court for Crown Cases Reserved, 1800. 2 East, P. C. 953.)

Thos. Wall was convicted upon an indictment for forging and knowingly uttering a will of land of one John Skidmore, deceased, attested by only two witnesses; and it did not appear in evidence what estate the supposed testator had in the land so devised, or of what nature it was. Wherefore it might be presumed to be freehold, and therefore the will void and of none effect by the express enactment of the statute of frauds (St. 29 Car. II, c. 3, § 5) for want of the attestation of three witnesses. The judges, on conference in Easter Term, 1800, held the conviction wrong; for, as it was not shown to be a chattel interest, it was presumed to be a freehold.⁴

REX v. TEAGUE.

(Court for Crown Cases Reserved, 1802. Russ. & R. 33.)

The prisoner was tried before Mr. Justice LeBlanc, at the Hereford Summer Assizes, in the year 1802, on an indictment charging him with feloniously, etc., making, forging, and counterfeiting a certain bill of exchange, as follows, viz.:

"No. Q. 621. 50*l*. Brecon, 24th June, 1799.

On demand, pay to the bearer fifty pounds, value received.

For Wilkins, Jeffreys, Wilkins and Williams.

Messrs. Mills, Vaughan & Co.

Bankers, Bristol.

Walter Jeffreys."

with intent to defraud Walter Wilkins, Walter Jeffreys, Jeffreys Wilkins, and William Williams, against the statute, etc.

A second count was for uttering the same, knowing it to be forged. There were two other similar counts, stating the intent to be to defraud Thomas Powell.

It appeared that the bill was drawn and signed by Walter Jeffreys, one of the partners of the house, for £10 only, on a sixteen penny stamp

³ See, also, *Waterman v. People*, 67 Ill. 91 (1873); *Colson v. Commonwealth*, 61 S. W. 46, 22 Ky. Law Rep. 1674 (1901). Cf. *Reg. v. Toshack*, 1 Den. 492 (1849); *State v. Grant*, 74 Mo. 33 (1881).

⁴ See accord: *State v. Guttridge*, 1 Bay (S. C.) 285 (1793); *People v. Wilson*, 6 Johns. (N. Y.) 320 (1810); *State v. Smith*, 8 Yerg. (Tenn.) 150 (1835); *People v. Harrison*, 8 Barb. (N. Y.) 560 (1850). Compare: *Butler v. Commonwealth*, 12 Serg. & R. (Pa.) 237, 14 Am. Dec. 679 (1824); *Thompson v. State*, 9 Ohio St. 354 (1850).

(then the proper stamp for promissory notes of ten pounds intended to be reissued after payment). This bill of exchange had been reissued three times by Wilkins & Co. as a £10 bill. It appeared that the bill had been altered by changing £10 into £50, in the part of the bill where the sum is expressed in figures, as also in the part where it is expressed in letters, and, so altered, had been passed by the prisoner to Thomas Powell.

The jury found the prisoner guilty of uttering it, knowing it to be forged; but the learned judge respited the judgment on the objections made by the prisoner's counsel, viz.:

Secondly.¹ That the act permitting the reissuing of notes after the same shall have been paid related only to promissory notes; but this was a bill of exchange, and could not be legally reissued without a fresh stamp, and, having been reissued three times before it was altered, it was not a valid bill for £10 at the time it was altered to £50, and therefore it was not that species of forgery which consisted in the altering a true and valid bill.

On the first day of Michaelmas term, 1802, all the judges met at Lord Ellenborough's chambers. On the second objection all the judges were of opinion that although the bill was not a good and valid bill for £10, having been reissued after having been paid, and being only stamped with the proper stamp for a reissuable promissory note, yet that it was the same thing as forging or uttering a forged bill with a wrong stamp, which has been determined to be a capital felony. They therefore held the conviction right.²

SECTION 2.—THE ACT BY WHICH THE FORGERY IS COMMITTED.

REX v. LOCKETT.

(Court for Crown Cases Reserved, 1772. 2 East, P. C. 940.)

Charles Lockett was convicted of knowingly uttering a forged order for the payment of money in these words: "Messrs. Neal, Fordyce & Down: Pay to William Hopwood or bearer £16. 10. 6. Rt. Vennest"—with intent to defraud John Scoles.

The case was that the prisoner applied to Scoles, a color man, and agreed to purchase goods to the amount of £10. 0. 6, which he was to send for, and he took away with him a little Prussian blue. He came again, pretending to be in a hurry, and presented this note, which he

¹ So much of the case as relates to the first objection is omitted.

² See, also, *State v. Fitzsimmons*, 30 Mo. 236 (1860); *State v. Johnson*, 26 Iowa, 407, 96 Am. Dec. 158 (1868); *State v. Coyle*, 41 Wis. 267 (1876).

said was a good one, and Scoles gave him £6. 10s., being the difference. No such person as Rt. Vennest kept cash with Messrs. Neal & Co., nor did it appear that there was any such man existing. The question submitted to the judges was whether this were an order within the statute, being in the name of a fictitious person? the doubt arising in what is said in Mitchell's Case. The judges, after very long consideration, at last agreed, in Trinity Term, 1774, that this was forgery. They thought it quite immaterial whether such a man as Vennest existed or not, or, if he did, whether he had kept cash at the banking house of Messrs. Neal & Co. It was sufficient that the order assumed those facts, and imported a right on the part of the drawer to direct such a transfer of his property.

COMMONWEALTH v. BALDWIN.

(Supreme Judicial Court of Massachusetts, 1858. 11 Gray, 197, 71 Am. Dec. 703.)

THOMAS, J.¹ This is an indictment for the forgery of a promissory note. The indictment alleges that the defendant, at Worcester, in this county, "feloniously did falsely make, forge, and counterfeit a certain false, forged, and counterfeit promissory note, which false, forged, and counterfeit promissory note is of the following tenor, that is to say:

"\$457.88.

Worcester, Aug. 21, 1856.

"Four months after date we promise to pay to the order of Russell Phelps four hundred fifty-seven dollars ⁸⁸/₁₀₀, payable at Exchange Bank, Boston, value received.

"Schouler, Baldwin & Co."

with intent thereby then and there to injure and defraud said Russell Phelps."

The circumstances under which the note was given are thus stated in the bill of exceptions: Russell Phelps testified that the note was executed and delivered by the defendant to him at the Bay State House, in Worcester, on the 21st of August, 1856, for a note of equal amount, which he held, signed by the defendant in his individual name, and which was overdue, and that in reply to the inquiry who were the members of the firm of Schouler, Baldwin & Co. the defendant said, "Henry W. Baldwin and William Schouler, of Columbus." He further said that no person was represented by the words "& Co." It appeared in evidence that the note signed Schouler, Baldwin & Co. was never negotiated by Russell Phelps. The government offered evidence which tended to prove either that there never had been any partnership between Schouler and Baldwin, the defendant, or, if there

¹ Part of the opinion is omitted.

ever had been a partnership, that it was dissolved in the month of July, 1856.

The question raised at the trial and discussed here is whether the execution and delivery of the note, under the facts stated, and with intent to defraud, was a forgery.

It would be difficult, perhaps, by a single definition of the crime of forgery, to include all possible cases. Forgery, speaking in general terms, is the false making or material alteration of or addition to a written instrument for the purpose of deceit and fraud. It may be the making of a false writing purporting to be that of another. It may be the alteration in some material particular of a genuine instrument by a change of its words or figures. It may be the addition of some material provision to an instrument otherwise genuine. It may be the appending of a genuine signature of another to an instrument for which it was not intended. The false writing, alleged to have been made, may purport to be the instrument of a person or firm existing, or of a fictitious person or firm. It may be even in the name of the prisoner, if it purports to be, and is desired to be received as, the instrument of a third person having the same name.

As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime.

An exception is stated to this last rule by Coke, in 3 Inst. 169, where A. made a feoffment to B. of certain land, and afterwards made a feoffment to C. of the same land, with an antedate before the feoffment to B. This was certainly making a false instrument in one's own name, making one's own act to appear to have been done at a time when it was not in fact done. We fail to understand on what principle this case can rest. If the instrument had been executed in the presence of the feoffee and antedated in his presence, it clearly could not have been deemed forgery. Beyond this, as the feoffment took effect, not by the charter of feoffment, but by the livery of seisin—the entry of the feoffer upon the land with the charter and the delivery of the twig or clod in the name of the seisin of all the land contained in the deed—it is not easy to see how the date could be material.

The case of *Mead v. Young*, 4 T. R. 28, is cited as another exception to the rule. A bill of exchange payable to A. came into the hands of a person not the payee, but having the same name with A. This person indorsed it. In an action by the indorsee against the acceptor, the question arose whether it was competent for the defendant to show that the person indorsing the same was not the real payee. It was held competent, on the ground that the indorsement was a forgery, and that no title to the note could be derived through a forgery. In this case of *Mead v. Young*, the party as-

sumed to use the name and power of the payee. The indorsement purported to be used was intended to be taken as that of another person, the real payee.

The writing alleged to be forged in the case at bar was the handwriting of the defendant, known to be such, and intended to be received as such. It binds the defendant. Its falsity consists in the implication that he was a partner of Schouler and authorized to bind him by his act. This, though a fraud, is not, we think, a forgery.

Suppose the defendant had said in terms, "I have authority to sign Schouler's name," and then had signed it in the presence of the promisee. He would have obtained the discharge of the former note by a false pretense, a pretense that he had authority to bind Schouler. "It is not," says Sergeant Hawkins, "the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery." 1 Hawk. c. 70, § 5.

If the defendant had written upon the note, "William Schouler, by his agent, Henry W. Baldwin," the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature. He relied upon the defendant's statement of his authority to bind him as partner in the firm of Schouler, Baldwin & Co.; or, if the partnership had in fact before existed, but was then dissolved, the effect of the defendant's act was a false representation of its continued existence.

In the case of *Regina v. White*, 1 Denison, 208, the prisoner indorsed a bill of exchange, "Per procuration, Thomas Tomlinson, Emanuel White." He had no authority to make the indorsement, but the twelve judges held unanimously that the act was no forgery.

The result is that the exceptions must be sustained and a new trial ordered in the common pleas. It will be observed, however, that the grounds on which the exceptions are sustained seem necessarily to dispose of the cause.

Exceptions sustained.

WRIGHT'S CASE.

(Lancaster Assizes, 1828. 1 Lew. 135.)

Prisoners were indicted for uttering a forged banker's check. It appeared that a person named Townsend was in the habit of signing blank checks and leaving them with his clerk when business called him away from home. One of these checks fell into the hands of the prisoners, who filled up the blank with the words "one hundred pounds," and dated it.

Coltman, for the prisoner, objected that, the signature being genuine, it could not be said that the prisoner had uttered a forged instrument.

BAYLEY, J. By filling in the body, and dating it, he made it a perfect instrument, which it previously was not.¹

COMMONWEALTH v. SANKEY.

(Supreme Court of Pennsylvania, 1853. 22 Pa. 390, 60 Am. Dec. 91.)

BLACK, C. J.² The defendant wrote a note payable to himself, for \$141, and got an illiterate man to sign it, by falsely and fraudulently pretending that it was for \$41 only. On a special verdict finding these facts, the court gave judgment in favor of the accused.

The act was a forgery according to all the text-writers on criminal law, from Coke to Wharton. But their doctrine is not sustained by the ancient English cases, and is opposed by the modern ones. Only three American decisions were cited on the argument; and we take it for granted that there are no others on the point. Two of these, *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206, *Hill v. State*, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441, are wholly with the defendant, and the other, *State v. Shurtliff*, 18 Me. 371, supports the argument of the commonwealth's counsel. The weight of the judicial authorities is in favor of the opinion that this is no forgery. We think that the arguments drawn from principle, and the reason of the thing, preponderate on the same side. It must be admitted that, in morals, such an imposture as this stands no better than the making of a false paper. But even a knave must not be punished for one offense because he has been guilty of another. Forgery is the fraudulent making or altering of a writing to the prejudice of another's right. The defendant was guilty of the fraud, but not of the making. The paper was made by the other person himself, in prejudice of his own right. To complete the offense, according to the definition it requires a fraudulent intent and a mak-

¹ Part of the case, dealing with another question, is omitted.

² The opinion only is printed.

ing both. The latter is innocent without the former, and the former, if carried into effect without the latter, is merely a cheat. If every trick, or false pretense, or fraudulent act by which a person is induced to put his name to a paper which he would not otherwise have signed, is to be called a forgery, where shall we stop, and what shall be the rule? Is it forgery to take a note for a debt known not to be due; or to procure a deed for valuable land by fraudulently representing to the ignorant owner that it is worthless; or to get a legacy inserted in a will by imposing on a weak man in his illness? All these would be frauds—frauds perpetrated for the purpose of getting papers signed—as much as that which was committed in this case. But no one thinks they are forgeries.

For these reasons, and the reasons given in the court below, which we fully adopt, the judgment is to be affirmed.²

SECTION 3.—THE INTENT.

REX v. SHEPPARD.

(Court for Crown Cases Reserved, 1810. Russ. & R. 169.)

The prisoner was tried before Mr. Justice Heath, at the Old Bailey September Sessions, in the year 1809, on an indictment consisting of four counts.

The first count charged the prisoner with forging a receipt for £19. 16s. 6d., purporting to be signed by W. S. West, for certain stock therein mentioned, with intent to defraud the governors and company of the Bank of England. The second count was for uttering the same knowing it to be forged, with the like intent. The third and fourth counts varied from the first and second in charging the intent to have been to defraud Richard Mordey.

It appeared in evidence at the trial, that Richard Mordey gave £20 to his brother Thomas Mordey in the month of January, 1809, to buy stock in the 5 per cent. navy.

In February following Thomas Mordey gave the £20 to the prisoner for the purchase of the said stock, on the prisoner's delivering to him the receipt stated in the indictment.

The prisoner, being examined at the bank, confessed that the receipt was a forgery, that there was no such person as W. S. West, whose signature appeared subscribed to the receipt, and that he, be-

² Accord: *Hill v. State*, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441 (1824); *Reg. v. Chadwick*, 2 Moo. & R. 545 (1841). Contra: *State v. Shurtliff*, 18 Me. 368 (1841).

ing pressed for money forged that name, but had no intention of defrauding Richard Mordey.

Richard Mordey and Thomas Mordey swore they believed that the prisoner had no such intent.

On examining the bank books, no transaction corresponding with this could be found.

The learned judge told the jury that the prisoner was entitled to an acquittal on the first and second counts, because the receipt in question could not operate in fraud of the governor and company of the bank.

That as to the third and fourth counts, although the Mordeys swore that they did not believe the forgery to have been committed with an intent to defraud Richard Mordey, yet as it was the necessary effect and consequence of the forgery, if the prisoner could not repay the money, it was sufficient evidence of the intent for them to convict the prisoner.

The jury acquitted the prisoner on the first and second counts, and found him guilty on the third and fourth counts; and the learned judge reserved this case for the opinion of the judges, to determine whether this direction to the jury was right and proper.

In Easter Term, 31st of May, 1810, all the judges were present, and they were all of opinion that the conviction was right; that the immediate effect of the act was the defrauding of Richard Mordey of his money.

REGINA v. HODGSON.

(Court for Crown Cases Reserved, 1856. 36 Eng. Law & Eq. 626.)

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by Bramwell, B., at the Staffordshire Spring Assizes, 1856:

Henry Hodgson was indicted at common law for forging and uttering a diploma of the College of Surgeons. The indictment was in the common form.

The College of Surgeons has no power of conferring any degree or qualification, but before admitting persons to its membership, it examines them as to their surgical knowledge, and if satisfied therewith admits them, and issues a document, called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the College of Surgeons, erased the name of the person mentioned in it, and substituted his own, changed the date, and made other alterations to make it appear to be a document issued by the college to him. He hung it up in his sitting room, and, on being asked by two other medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion.

When a candidate for an appointment as vaccinating officer, he stated he had his qualification, and would show it if the person inquiring (the clerk of the guardians, who were to appoint to the office) would go to his (the prisoner's) gig. He did not, however, then produce or show it.

The prisoner was found guilty, the facts to be taken to be that he forged the document in question, with the general intent to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and that he showed it to two persons, with the particular intent to induce such belief in those persons, but that he had no intent in forging, or in the uttering and publishing (assuming there was one), to commit any particular fraud or specific wrong to any individual.¹

JERVIS, C. J. I am of opinion that this conviction is wrong. The recent statute for further improving the administration of criminal justice (St. 14 & 15 Vict. c. 100) alters and affects the forms of pleadings only, and does not alter the character of the offense charged. The law as to that is the same as if the statute had not been passed. This is an indictment for forgery at common law. I will not stop to consider whether this is a document of a public nature or not, though I am disposed to think that it is not a public document; but, whether it is or not, in order to make out the offense there must have been, at the time of the instrument being forged, an intention to defraud some person.¹ Here there was no such intent at that time, and there was no uttering at the time when it is said there was an intention to defraud.²

Conviction quashed.³

¹ Part of this case is omitted.

² Wightman, J., and Bramwell, B., delivered concurring opinions, and Cresswell and Erle, JJ., concurred.

³ Compare *Reg. v. Toshack*, 1 Den. C. C. 492 (1849).

CHAPTER XX.

LIBEL.

THE CASE DE LIBELLIS FAMOSIS.

(Star Chamber, 1605. 5 Rep. 125.)

In the case of L. P. in the Star Chamber this term against whom the Attorney General proceeded ore tenus on his own confession, for composing and publishing an infamous libel in verse, by which John, Archbishop of Canterbury (who was a prelate of singular piety, gravity and learning, now dead), by descriptions and circumlocutions, and not in express terms, and Richard, Bishop of Canterbury, who now is, were traduced and scandalized, in which these points were resolved.

1. Every libel (which is called *famosus libellus*, seu *infamatoria scriptura*) is made either against a private man, or against a magistrate or public person. If it be against a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends per consequens to quarrels and breaches of the peace, and may be the cause of shedding of blood, and of great inconvenience. If it be against a magistrate or other public person, it is a greater offense; for it concerns not only the breach of peace, but also the scandal of government.¹

2. Although the private man or magistrate be dead at the time of the making of the libel, yet it is punishable; for in the one case it stirs up others of the same family, blood or society to revenge, and to break the peace, and in the other the libeler traduces and slanders the state and government, which dies not.

It is not material whether the libel be true, or whether the party against whom it is made be of good or ill fame.² Every infamous libel, *aut est in scriptis*, *aut sine scriptis*. A scandalous libel in scriptis is, when an epigram, rhyme or other writing is composed or published to the scandal or contumely of another, by which his fame and dignity may be prejudiced. And such libel may be published: 1. *Verbis aut cantilenis*, as where it is maliciously repeat-

¹ Part of this case is omitted.

² St. 6 & 7 Vict. c. 96, § 6, allows the truth of the alleged libel to be given in evidence as a complete defense, if it appear that the publication was made with proper motives and for justifiable ends. Similar statutes exist in our states. See *Commonwealth v. Snelling*, 15 Pick. (Mass.) 337 (1834); *State v. White*, 29 N. C. 180 (1847).

ed or sung in the presence of others.³ 2. Traditione, when the libel, or any copy of it is delivered over to scandalize the party. *Famosus libellus sine scriptis* may be: 1. *Picturis*, as to paint the party in any shameful and ignominious manner. 2. *Signis*, as to fix a gallows, or other reproachful and ignominious signs at the party's door or elsewhere. And there are certain marks by which a libeler may be known; *quia tria sequuntur defamatorem famosum*: 1. *Pravtatis incrementum*, increase of lewdness. 2. *Bursæ decrementum*, decrease of money, and beggary. 3. *Conscientiæ detrimentum*, shipwreck of conscience.

GILES v. STATE.

(Supreme Court of Georgia, 1849. 6 Ga. 276.)

LUMPKIN, J., delivering the opinion.⁴

1. Did the indictment contain a sufficient averment of the publication of the libel? It charges that David Giles, the defendant, on the 6th day of July, 1847, did maliciously and falsely "utter and publish—that is to say, did then and there write, and fasten upon the side of a tree in a public place, where it could be there read—the following malicious defamation, in writing, of and concerning one William Thompson (the prosecutor) and others," etc. It is objected that it should have been alleged that the libel was read. Was this necessary? If so, then the fact that it was read should have been proven also. We are of opinion that neither was requisite to constitute the offense.

Actual communication of the contents of a libel, as by singing or reading, is one mode of publication; but it is neither the only nor the usual mode. The common method is by the posting up of the paper, written or printed, or its delivery, and no question is ever asked as to whether it was read or not. We say of an author that he has published a book, when he has given its contents to the world; and we speak of the publication of a will, without meaning to denote that the contents of the instrument have been actually communicated. So it is with a libel. Publication, says Best, J., in the *King v. Sir Francis Burdett*, is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone. He has shot his arrow and it does not depend upon him whether it hits the mark or not. There is an end of the *locus penitentiae*, his offense is complete, all that depends upon him is con-

³ "If a man insinuates a fact in asking a question, meaning thereby to assert it, it is the same thing as if he asserted it in terms." Alderson, B., in *Reg. v. Gathercole*, 2 Lewin, 255 (1838).

⁴ Only so much of the opinion as relates to publication is printed.

summed, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act.

So, then, the mere delivering over or parting with the libel is a publication. There need be no averment or proof of the actual communication of the contents of the paper. Lord Coke says, a libel may be published traditione, by delivery (5 Reports, 126, a); and this definition is adopted by Chief Baron Comyns, in his Digest, tit. "Publications," b, 1. If a letter containing a libel is sent sealed to another, or to the party himself against whom it is made² or is addressed through the post office, it is a sufficient publication. 1 Saund. Rep. 132, notes.

If these propositions be tenable, and I doubt not they are law, then the case before us is free from doubt. I would only add, upon this branch of the case, that Chief Justice De Grey, in delivering the opinion of the court in *Baldwin v. Elphinston*, 2 W. Bl. 1037, says there are in *Rastall's Entr. tit. "Action sur le Case,"* 13 a, two instances of constructive publications, by delivering letters to A. and B., and by fixing them on the door of St. Paul's Church.

The judgment of the court below is affirmed.

COMMONWEALTH v. BLANDING.

(Supreme Judicial Court of Massachusetts, 1825. 3 Pick. 304, 15 Am. Dec. 214.)

PARKER, C. J., delivered the opinion of the court.³

As to that part of the instructions of the judge which states that the malicious intent charged in the indictment (there being no evidence admitted to prove the truth of the facts alleged) was an inference of law, this is certainly the common-law doctrine, and it never has been repealed by any statute of this commonwealth, nor overruled by any decision of this court.

The propagator of written or printed tales to the essential prejudice of any one in his estate or reputation is a public offender, and is not allowed to excuse himself by the additional wrong of proving in a court of justice, in a collateral way, the facts which he has unwarrantably promulgated.

And yet there are some exceptions to this general rule, recognized by the common law, and others which are rendered necessary by the principles of our government.

² Accord: *Clutterbuck v. Chaffers*, 1 Stark. 471 (1816); *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105 (1828); *Reg. v. Brooke*, 7 Cox, C. C. 251 (1857).

When the libelous matter is sent to the prosecutor himself, the gist of the offense is the tendency to a breach of the peace. The intent thus to cause a breach of the peace need not be averred in the indictment, *Reg. v. Brooke*, supra; but if the intent alleged is to injure, prejudice, or aggrieve the prosecutor in his business, it is not sustained by proof that the libel was sent to the prosecutor, *Rex v. Wegener*, 2 Stark. 245 (1817).

³ Portions of the opinion are omitted.

These exceptions are all founded in a regard to certain public interests, which are of more importance than the character or tranquillity of any individual. All proceedings in legislative assemblies, whether by speech, written documents, or otherwise, are protected from scrutiny elsewhere than in those bodies themselves, because it is essential to the maintenance of public liberty that in such assemblies the tongue and the press should be wholly unshackled. So proceedings in courts of justice, in which the reputation of individuals may be involved, are to be free from future animadversions, because the investigation of right demands the utmost latitude of inquiry, and men ought not to be deterred from prosecuting or defending there by fear of punishment or damages. Yet in these instances, if this necessary indulgence is abused for malicious purposes, a pretense only being made of the forms of legislative or judicial process, the party so conducting himself is amenable to the law. The right, also, of complaining to any public constituted body of the malversation or oppressive conduct of any of its officers or agents, with a view to redress for actual wrong or the removal of an unfaithful officer, may be justified, because the case will show that the proceeding does not arise from malicious motives, or, if it does, because the common interest requires that such representations should be free. And there are cases of mere private import, such as an honest, though mistaken, character of a servant, which, when requested by any one having an interest, the law considers innocent. These cases are all provided for by the common law, and they go far to render harmless that much decried rule that the truth is no defense in a prosecution for libel. *Rex v. Wright*, 8 T. R. 293; *Rex v. Creevey*, 1 M. & S. 273; *Lake v. King*, 1 Saund. 131; *Astley v. Younge*, 2 Burr. 807; *Rogers v. Clifton*, 3 B. & P. 587; *Esp. Dig.* (3d Ed.) 505; *Thorn v. Blanchard*, 5 Johns. (N. Y.) 508; *Rex v. Fisher*, 2 Campb. 563; *Starkie on Slander*, c. 11.

But there are certain other cases, not yet distinctly adjudicated upon, where the truth of charges is a legitimate ground of defense, by clear inference from principles recognized by the common law and our own tribunals.

In *Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212, it is stated "that a man may apply by complaint to the Legislature to remove an unworthy officer, and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel."

This is put for illustration of the principle, not to exhibit the only instance in which it is to be applied. A complaint to the executive against an officer holding his place at its pleasure, to a court against an officer whom they have the power to dismiss, to any body of men having power over its officers, the subject of the complaint

being of a public nature, or the person complaining having a particular interest in it, falls within the same principle.

Thus, if a minister of the gospel should be guilty of gross immoralities, and one of his parish should complain to the church in order that an inquiry might be instituted, or if a candidate for the ministry should from vicious habits be unfit for the station he seeks, since all are interested in the purity of the ministerial character, information to those whose duty it is to determine his qualifications would not be libelous, if communicated in a spirit of truth and candor. Various other cases might be put, in which, if it appeared that the purpose was sincere and upright and wholly free from malice, the truth of the facts stated would be a good defense. But in all such cases the information is to be given to those who have a right to act upon it, and whose interest and duty are concerned in it; for a promiscuous promulgation of the same facts would of itself be the strongest evidence of malice, and in such cases the court must judge whether the occasion is a fit and proper one for the admission of such defense, and the jury must determine the motives and the end.

Having thus attempted to vindicate the law of libel, as established in this commonwealth, from the aspersions which are frequently cast upon it, we will consider its application to the case before us, in order to determine whether, upon either of the grounds assumed, a new trial ought to be granted.

The other objection, which opens the general question, is that the judge refused to admit in evidence the inquisition which is alluded to in the publication, and with a view to prove the truth of the facts therein stated. Had the inquisition been published without any defamatory comment, it certainly would not have furnished ground for this prosecution; for it does not of itself contain any libelous matter, and it is in the nature of a judicial inquiry, the publication of which would not be criminal, unaccompanied by direct proof of malice. The inquisition merely states that a deceased stranger, who was found dead in a tavern kept by Fowler, came to his death by intoxication. Now, this may be true without any implication against Fowler; for every innholder is liable to have drunken people come to his house, and, if they die there, he may be entirely innocent of the cause of their death. But the remarks made by the defendant charged Fowler with having administered the liquid poison, and thus being the cause of the death of the stranger; and the public are warned against resorting to the house where such practice is allowed, and the municipal authorities are invoked to exert their power by taking away or withholding the license of Fowler to keep a public house. The matter of this publication is certainly libelous, as it insinuates gross misconduct against Fowler, and directly charges him with a violation of his duty, and exposes him to the loss of his livelihood, so far as that depends upon the

reputation of his inn for regularity and order. Admitting the account of the inquisition to be correct as published, yet the addition of comments and insinuations tending to asperse Fowler's character renders it libelous. *Thomas v. Croswell*, 7 Johns. (N. Y.) 264, 5 Am. Dec. 269.

But it is said that this is a matter of public concern, and that the defendant was impelled by a sense of public duty to warn travelers and others from a house which was thus deservedly stigmatized. The answer is that the defendant did not select a proper vehicle for the communication. The natural effect of a publication of this sort in a newspaper is to procure a condemnation in the public mind of the party accused, and his punishment, by bringing his house into disrepute, without any opportunity of defense on his part, so that the accuser becomes judge and executioner at one stroke, and his purpose if a malicious one, is answered without any means of relief; for the mischief to the person libeled would be quite as great if he were innocent as if he were guilty. If it should be said in answer that all this is right if the allegation be true, and if not true he may recover his damages in an action of slander, it may justly be replied that this remedy is uncertain and incomplete; for in many cases the slanderer will be unable to respond in damages, and the suffering party will be subjected to the additional injury of a troublesome and expensive lawsuit, with little or no hope of recompense.

There may be cases where (there being no other mode by which great mischief can be warded off from the public) a newspaper communication, made with the sole view of preserving the citizens from injury to their life or health, would be justifiable. Such might be the case of an apothecary selling and distributing poison in the form of medicine, stated by a distinguished member of the late convention for revising the Constitution. This is an extreme case, where to delay information until the forms of law should be pursued might endanger the lives of hundreds, and such a case would be a law to itself; the public safety being the supreme law, and it being every citizen's duty to give warning in such cases. There may be cases of gross swindling, where nothing but immediate notice would secure the public against depredation, which would be governed by the same principle.

But in the case before us there was no such urgent necessity. The statute regulating licensed houses provides the restrictions and the punishment which the Legislature has thought adequate to the offenses of the nature contained in this libel. For suffering excessive drinking in his house, the innkeeper is subject to a penalty. For a second offense, he is to be put under bond for good behavior, in addition to a pecuniary mulct. For a third, he is to forfeit his license and shall be disqualified to keep a public house for two years. And, besides all this, if his misconduct is continued so as to constitute his house disorderly, or so that he violates the law for regulating it, he forfeits the penalty of his recognizance. Other guards and securities are pro-

vided in the statute to prevent the abuse of the license, and a complaint may be made to the selectmen, to a justice of the peace, or to a grand jury, by any prson who has knowledge of such offenses, without incurring the risk of a prosecution for libel. There was, then, no necessity for this newspaper publication, and the defendant, by resorting to it, has taken the law into his own hands unwarrantably, instead of resorting to those tribunals which the laws have constituted for the correction of these offenses. This, then, is a case in which the defendant cannot be allowed to excuse himself by showing the truth of the accusation which he has unjustifiably made. He had no right to arraign the prosecutor before the public in the form which he adopted, and thus destroy the reputation of his house, without leaving him any means of showing his innocence of the charges made against him. The occasion was not a proper one for a newspaper denunciation.

Motion for a new trial overruled.

CHAPTER XXI.

PERJURY.

If any one swear a false oath on a relic, and he be convicted, let him forfeit his lands, or half his "wer," and let that be common to lord and bishop. And let him not be thenceforth oath-worthy; unless he the more thoroughly before God make "bot," and find him "borh" that he will ever after abstain from the like.

Laws of Cnut, II, 36.

Perjury is a crime committed when a lawful oath is ministered by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely, and falsely in a matter material to the issue, or cause in question, by their own act, or by the subornation of others.

3 Coke, Inst. 164.

CUSTODES v. GWINN.

(Upper Bench, 1652. Style, 324.)

Howell Gwinn was indicted of perjury for taking of a false oath in an affidavit made before a Master of the Chancery, and was found guilty. It was moved in arrest of judgment.¹

(2) It doth not appear that the party took a false oath, for it appears not whether the Master of the Chancery had any power to take this oath, and if he had not then it cannot be perjury.

Maynard. It is not necessary to show that a Master of the Chancery hath authority to take an oath, for it is the common course and practice of the Court of Chancery for the Masters to take oaths.

NICHOLAS, Justice. A Master of the Chancery of common right hath no power to take an oath, and therefore in this case you should have pleaded precisely that he had authority, otherwise it cannot be good.

ROLLE, Chief Justice. Perjury at the common law is intended to be in some court, and legal proceedings for a false oath made before us not touching the matter in question between the parties, an indictment of perjury lies not, and it appears not here that the Chancery took notice of the affidavit, for nothing was done upon it. If one make a false oath, the party is punishable for it by an action upon the case, in case it be not perjury, for which he may be indicted for it. A false oath is one thing, and perjury is another thing, for one is judicial, and the other is extrajudicial. And the law inflicts greater punishment

¹ Part of this case is omitted.

for a false oath made in a court of justice than if it be made elsewhere, because of the preservation of justice.

JERMYN, Justice, said that perjury takes its name from perverting of justice, and therefore it is intended to be in a court of justice. The court held the indictment ill, and gave judgment against the Custodes.

GURNEIS' CASE.

(Star Chamber, 1611. 3 Coke, Inst. 166.)

Damages were awarded to the plaintiff in the Star Chamber according to the value of his goods riotously taken away by the defendant. The plaintiff caused two men to swear the value of his goods that never saw nor knew them. And though that which they swear was true, yet because they knew it not, it was a false oath in them, for the which both the procurer and the witnesses were sentenced in the Star Chamber.¹

STATE v. HATTAWAY.

(Supreme Court of South Carolina, 1819. 2 Nott & McC. 118, 10 Am. Dec. 580.)

Indictment for perjury. The facts were: One Shackleford having been indicted for stealing a cow, and afterwards discharged, brought an action against the prosecutor for malicious prosecution. In this action Hattaway was called as a witness, and testified that Shackleford purchased the cow in question from one Carter, and that he was present at the time. Being asked where he lived at the time, he said, "near Carter's, perhaps within 100 yards," whereas it was proved that he did not live in the state. The perjury assigned was his false testimony as to where he lived.

NORR, J.² If the defendant lived 100 miles off, and was present at the sale, he was a competent witness to prove it. If he lived within 50 yards, and was not present, he could know nothing of the matter.

¹ "Granting the materiality of the fact, whether it be a statement of knowledge, or of information or belief, or a simple statement of a fact, if the witness knows that the fact is not so, or that he has no such information, or no such belief, he is guilty. But if he only swears rashly to his belief of a matter of which he does not profess to have personal knowledge, the jury cannot be permitted to decide on the reasonableness of his belief, except as tending to show whether he did believe. In short, perjury is always of some matter of fact; and belief may be a fact. In this case, the only questions of fact put in issue by the indictment and by the law are: Was the statement false, and did the defendant know it to be false? In this respect, it is like the offense of passing a counterfeit note, knowing it to be counterfeit. Proof of reasonable cause of belief may warrant a jury to find knowledge; but it is not the legal equivalent of knowledge." Lowell, J., in *United States v. Moore*, Fed. Cas. No. 15,803.

² Part of the opinion is omitted.

It was not a fact of such a nature as to be better known to him, in consequence of the contiguity of residence. It may sometimes be difficult to determine how far the evidence of a particular fact may go to strengthen the testimony of a witness to a more material point in a case, and perhaps no precise and definite rule can be laid down on the subject. In all cases, therefore, so highly penal, where the question is of a doubtful character, I should incline to favor the side of the accused. In the case now under consideration, I cannot conceive that the testimony was either directly or indirectly material to the issue. I am of opinion, therefore, that a new trial ought to be granted.

COLCOCK, JOHNSON, RICHARDSON, and GANTT, JJ., concurred.

ARDEN v. STATE.

(Supreme Court of Errors of Connecticut, 1836. 11 Conn. 408.)

WILLIAMS, C. J. The only question in this case is whether the false taking of a poor debtor's oath before a magistrate authorized to administer it constitutes the crime of perjury.¹

Perjury, as defined by Lord Coke is when a lawful oath is administered, by any that hath authority, to any person, in a judicial proceeding, who sweareth absolutely and falsely, in a matter material to the issue or cause in question, by their own act, or the subornation of others. 3 Inst. 163. Hawkins says it seemeth to be a willful false oath, by one who, being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely to a matter of some consequence to the point in issue, whether he be believed or not. 1 Hawk. P. C. c. 69, § 1. Chitty adopts Lord Coke's definition; and Russell speaks of a proceeding in a court of justice. 2 Russ. 1751. His American editor concurs with Judge Johnson, in the case before cited, that the word "court" is substituted for the word "course" of justice. And it is believed that those who speak of a judicial proceeding, and of a proceeding in a court of justice, mean the same thing. It is apparent it cannot be intended that the oath must be administered before a court. It need not be before a court of record. 2 Rol. Abr. 257. It may be before a court baron. 1 Mod. 55; Winch, 3. Or a court of requests. Hut. 34. Or an ecclesiastical court. Cro. Eliz. 609; 1 Sid. 454. Or before commissioners. 1 Show. 397; Cro. Car. 97. Or in an answer in chancery. Cro. Car. 321, 327, 353; Cro. Eliz. 907; 2 Burr. 1189. Or upon a complaint to the Chancellor, on account of the arrest of one of the officers of his court. 1 Term Rep. 63. So, too, it may be upon some collateral matter, not directly connected with the issue of a cause on trial, as an affidavit to hold to bail. Peake's Cas. 112. Or when one, who offers himself as bail, swears his property to be greater than it is. Cro. Car. 146. And the crime

¹ Part of the opinion is omitted.

may be committed, in some court of justice having power to administer oaths, or before some magistrate or proper officer invested with similar authority, in some proceeding relative to a civil suit, or criminal prosecution. 4 Bl. Com. 137.

In the case before the court it is not denied that the oath was false, the intention willful, the oath lawfully administered, and the assertion absolute. But it is denied that it is in the course of judicial proceeding, and that it is material.

In support of the first proposition, it is said that it was decided, in the case of *Betts v. Dimon*, 3 Conn. 107, that the magistrate in such a case acted, not judicially, but ministerially, and therefore it cannot be perjury. But the administration of an oath to a witness giving a deposition, or to a party making an affidavit to procure a continuance of his cause, or to bail as to the amount of his property, is not a judicial, but ministerial, act, and yet it is not to be doubted that the deponent might be guilty of perjury; for all such false oaths as are taken before those who are in any way intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries. 1 Hawk. P. C. c. 60, § 3.

Here the magistrate had a general power to administer oaths, and the particular power to administer this oath. He was intrusted with a portion of the administration of public justice; for he was to decide, in some capacity, whether the oath should be administered. The question is not so much in what character the magistrate acted, as what was to be the effect of his act? Would it affect the course of public justice? For that purpose we must look at the situation of these parties. After the usual course of litigation, the creditor had obtained a judgment and execution against his debtor, and had confined him in prison. The debtor wished to be relieved from the inconvenience of this judgment, and to deprive the creditor of one of those means of satisfying it which the law had given him, and for this purpose took the oath which has given rise to this inquiry; and the effect of it is to relieve him from the operation of the judicial sentence and to deprive the creditor of the benefit of it. Is not, then, the immediate effect to interfere with the course of public justice?

Suppose the application were for a new trial, or an *audita querela*, or a *habeas corpus*, and a similar oath had been taken before a magistrate; could there be a doubt that it would be perjury? The effect in some of these cases might be greater; but, as it respects this question, they seem to be of a similar character. They all are intended, after final judgment, to vary the situation and rights of the litigant parties, and to deprive the creditor, in a greater or less degree, of the fruits of that judgment. If, then, this be not, technically speaking, a judicial proceeding, the court cannot say it is an extrajudicial proceeding; but, on the other hand, they think it is a proceeding calculated materially to affect the course of justice.

It was further said that here was no point in issue, or, in the language of the law, nothing in debate, between these parties. So far as regards a formal issue, this is true; and that will apply to every oath collateral to the question at issue. But here the real question between the parties was, shall, or shall not, this debtor be liberated from his imprisonment, unless the creditor will support him? A question of deep interest to one party, and of some importance to the other; a question which the forms of proceeding cannot conceal.

The court, therefore, are of opinion, and advise the superior court, that the offense charged in this information is perjury, and that there is no error in the judgment of the county court.

REGINA v. TYSON.

(Court for Crown Cases Reserved, 1867. L. R. 1 C. C. 107.)

At a session of the Central Criminal Court, held on the 10th of June, 1867, and following days, Thomas Tyson was tried before me on an indictment for perjury. It was alleged in the indictment, and appeared in evidence, that at the May session of the Central Criminal Court one Owen Sullivan was tried for a robbery, and that upon that trial Tyson was called as a witness on behalf of Sullivan. The indictment went on to allege that upon the trial of Sullivan it was material to ascertain whether Sullivan was or was not at a house, No. 20, in Mint street, in the borough of Southwark, on the evening of the 13th of April, 1867, between the hours of 8 o'clock and 10 o'clock, and whether Sullivan had lived at the same house for two years then last past, or from March, 1865, to March, 1866; and that Tyson falsely swore as such witness, first, that on the 13th day of April, 1867, Sullivan came to 20 Mint street at half-past 8 in the evening, and did not go out again that evening; second, that Sullivan had lived in the said house for two years then last past; and, third, that during the whole of that time Sullivan had never been absent from the same house for more than three nights together. Perjury was assigned upon each of the above allegations, and the prisoner was convicted on the last two.

I reserved the question for the consideration of the court whether the two last allegations of Tyson, upon which perjury was assigned, were sufficiently material on the trial of Sullivan to support the indictment for perjury in respect of them.

KELLY, C. B. The real question is whether, on this indictment, these two statements were material. We all agree that they were, as they tended to render more probable the truth of the first allegation. When it had been sworn by the witness that at the time of the robbery Sullivan was in Mint street, it tended to render that statement infinitely

more credible to add, "I, as deputy, know that he lodged there for nearly two years. and never was absent more than a night or two all that time." Under the circumstances, without giving any opinion as to whether the conviction could have been supported if the evidence had affected the witness' credit only, we affirm the conviction.¹

¹ Bramwell, B., and Lush, J., delivered concurring opinions. Willes and Byles, JJ., concurred.



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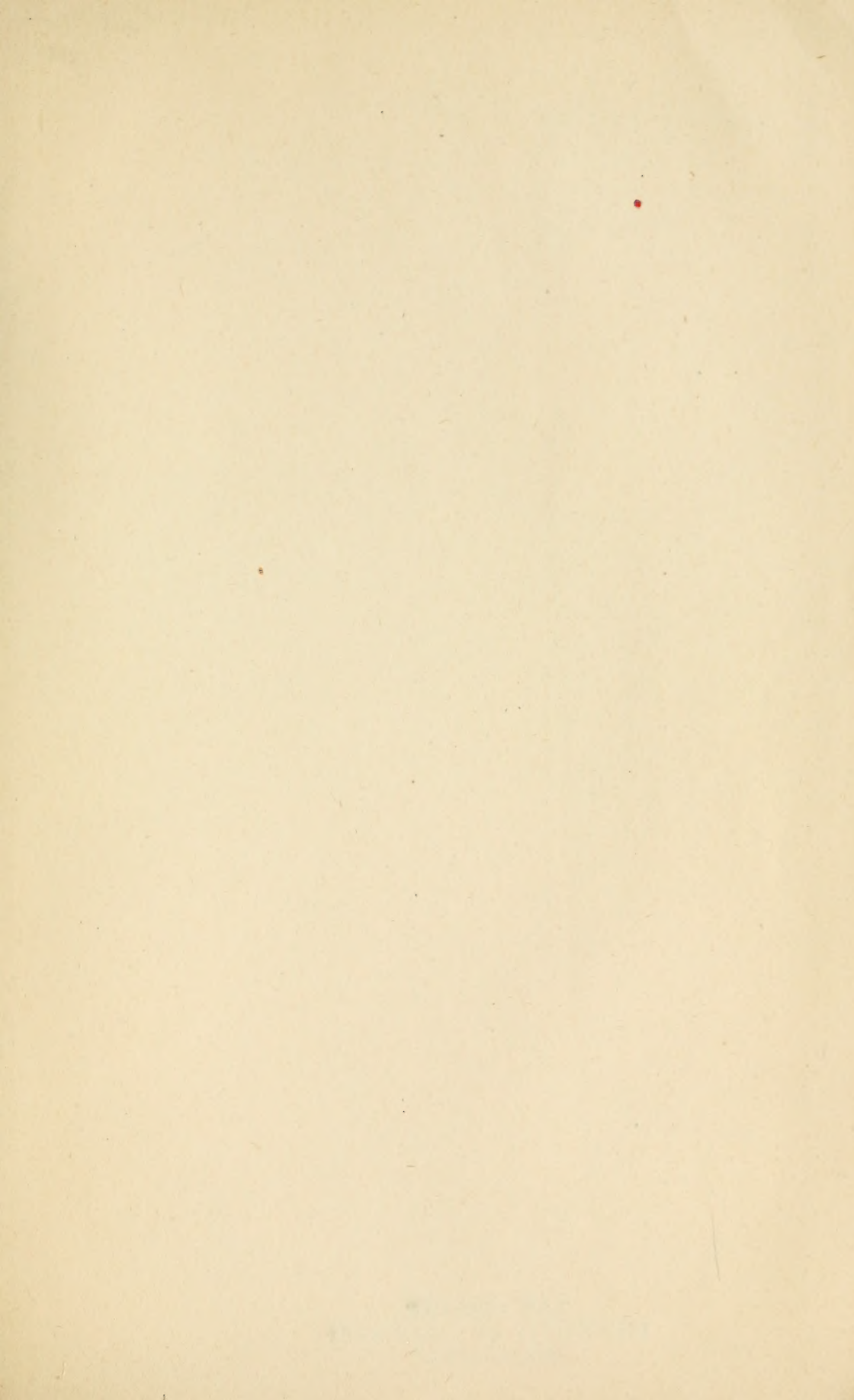
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